No. 405

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL, APPELLANT,

v.

THE STATE OF TEXAS, APPELLEE.

ON APPEAL FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY, TEXAS

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR

American Civil Liberties Union
American Medical Association
Correctional Association of New York
Methodist Board of Christian Social Concerns
North American Association of Alcoholism Programs
North American Judges Association
North Conway Institute
Texas Commission on Alcoholism
Washington D.C. Area Council on Alcoholism

AS AMICI CURIAE

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American Civil Liberties Union, American Medical Association, Correctional Association of New York, Methodist Board of Christian Social Concerns, North American Association of Alcoholism Programs, North American Judges

Association, Texas Commission on Alcoholism, and Washington D.C. Area Council on Alcoholism hereby respectfully move for leave to file a brief as Amici Curiae in the above entitled case. Counsel for Appellant have consented to the filing of the attached brief. The consent of Counsel for Appellee was requested but refused.

The interests of Amici and their reasons for requesting leave to file a brief are set out at pages 2-5 of the attached brief.

Respectfully submitted,

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November 24, 1967

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Commonwealth v. Owens, Middlesex, Mass., Super. Ct. No. 74393 47

District of Columbia v. Phillips, D.C. Ct. Gen. Sess. Crim. No. No. DC-855-67 (April 26, 1967), reprinted in 113 Cong. Rec. H5584 (May 16, 1967) (daily ed.) 29, 57

District of Columbia v. Walters, D.C. Ct. Gen. Sess. Crim No. DC-1850-66 (August 16, 1966), reprinted in 112 Cong. Rec. 22716 (September 22, 1966) (daily ed.) 53

Driver v. Hinnant, 243 F.Supp. 95 (E.D.N.C. 1965), *rev'd*, 356 F.2d 761 (4th Cir. 1966) ..... *Passim*

Dunlap v. City of Atlanta, Fulton County, Ga., Super. Ct. No. B-29126 (July 17, 1967), reprinted in 113 Cong. Rec. H11089 (August 23, 1967) (daily ed.) 46

Easter v. District of Columbia, 209 A.2d 625 (D.C. Ct. App. 1965); *rev'd*, 361 F.2d 50 (D.C. Cir. 1966) (*en banc*) ... *Passim*

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Fain v. Commonwealth, 78 Ky. 183, 39 Am. Rep. 213 (1879).... 21

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Jackson v. United States, 102 F. 473 (9th Cir. 1900) 18

In re Kemmler, 136 U.S. 436 (1890) 18

Lee v. Hendrick, Pa. Common Pleas Ct. (Phil.) No. H.C.-0075 (August 31, 1967), digested in 1 BNA Crim. L. Reptr. 2364 (September 20, 1967), reprinted in 113 Cong. Rec. H15368 (November 15, 1967) (daily ed.) 46

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Martin v. State, 31 Ala. App. 334, 17 So.2d 427 (1944) 21

Martinez v. State, 137 Tex. Cr. Rep. 434, 128 S.W.2d 398 (1939) 13

Morissette v. United States, 342 U.S. 246 (1952) 20, 42

Nabob Oil Co. v. United States, 190 F.2d 478 (10th Cir.), *cert. denied*, 342 U.S. 867 (1951) 20

News Syndicate Co., Inc., 44 L.A. 308 (1964) 39

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People v. Freeman, 16 Cal. App. 2d 110, 142 P.2d 435 (1943) ... 21

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Schompert v. Celebrezze, W.D.N.Y. Civil No. 10937 (May 24, 1966), reprinted in 112 Cong. Rec. 22718 (September 22, 1966) (daily ed.) 48

Seattle v. Hill, Wash. Sup. Ct. No. 39050, argued on March 28, 1967 ..... 27, 47, 1c

Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931) 29

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State v. Dobney, Los Ang. Mun. Ct. No. D475555 (May 16, 1966), reprinted in 112 Cong. Rec. 22718 (September 22, 1966) (daily ed.), *rev'd on other grounds*, Los Ang. Super. Ct. App. Div. No. CRA 6963 (October 14, 1966) 47

State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964) 42, 2c

State v. Fearon, Minn. Sup. Ct. 47

State v. Freiberg, 35 Wis.2d 480, 151 N.W.2d 1 (1967) 47, 48

State v. McCullough, 114 Ia. 532, 87 N.W. 503 (1901) 21

State v. Pike, 49 N.H. 399 (1869) 23, 24, 57

State v. Potts, 100 N.C. 457, 6 S.E. 657 (1888) 24-27, 44

State v. Ricketts, Montgomery County, Md., Cir. Ct. Crim. No. 8787 (October 25, 1967), reprinted in 113 Cong. Rec. S15974 (November 7, 1967) (daily ed.) 47

State v. Strasburg, 60 Wash. 106, 110 Pac. 1020 (1910) 29

Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965) 45

Trop v. Dulles, 356 U.S. 86 (1958) 17, 18, 32

United States v. Currens, 290 F.2d 751 (3d Cir. 1961) 20

United States v. Drew, 25 Fed. Cas. No. 14,993 (C.C.D. Mass. 1828) 25

United States v. MacLeod, 83 F. Supp. 372 (E.D. Pa. 1943) 29

United States v. Malafronte, 357 F.2d 629 (2d Cir. 1966) 29

United States v. McGlue, 26 Fed. Cas. No. 15,679 (C.C. D.Mass. 1851) 25

Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946) ... 18

Weems v. United States, 217 U.S. 349 (1910) 18

Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957) 28

CONSTITUTIONS AND STATUTES:

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North Carolina General Statutes
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United States Constitution:
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§ 25-128 ..... 43, 51, 1d, 7d

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Seattle Municipal Ordinances:
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Texas Civil Statutes:
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Texas Code of Criminal Procedure:
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Texas Penal Code:
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Art. 477 ..... 5, 13, 28, 35, 36, 41

OTHER AUTHORITIES:

Case Note, 19 Ala. L. Rev. 183 (1966) 50

"Alcoholism," *Hearings Before Subcommittee No. 3 of the Committee on the District of Columbia, House of Representatives*, 90th Cong., 1st Sess., on H.R. 6143 (1967) ... 52, 53, 9g

Alexander, *Jail Administration* (1957) 16g

American Hospital Association, *Statement on Admission of Alcoholic Patients to the General Hospital*, 31 J. Am. Hosp. Assn 106 (December 1, 1957) 2a

American Medical Association, *Manual on Alcoholism* (1967) 1a

American Medical Association, *Today's Health Guide* (1965) 28, 1a

Case Note, 16 Am. Univ. L. Rev 295 (1967) 50

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Aristotle, *Nichomachean Ethics* (Odyssey Press 1951) 20

Casenote, 8 Ariz. L. Rev. 351 (1967) 50, 1h

20 Ark. L. Rev. 365 (1967) 50

Bacon, *Alcoholics Do Not Drink*, 315 The Annals of the American Academy of Political and Social Science 55 (January 1958) 27

The Bible 26

Block, *Alcoholism: Its Facets and Phases* (1965) 40, 24g

Case Comment, 46 B.U. L. Rev. 409 (1966) 50

Botein, *Speech to the Conference on the Handling of Offenders in the City of New York* (1965) 32, 56

Recent Decision, 2 Brook. L. Rev. 324 (1967) 50

Brunner-Orne, *The Role of the General Hospital in the Treatment and Rehabilitation of Alcoholics*, 19 Quarterly Journal of Studies on Alcohol 108 (March 1958) 23g

Butler, *Erewhon* (1872) 22

"California Jails," *Report of the Citizens Advisory Committee to the Attorney General of California on Crime Prevention* (1956) 14g

Case Note, 15 Cath. U. L. Rev. 259 (1966) 50, 1h

Note, 36 U. Cin. L. Rev. 258 (1967) 19, 50

2 Colum. J. of Law & Soc. Prob. 109 (1966) 50, 1h

Concerning Responsibility of Psychiatrists and Other Physicians for Alcohol Problems, a position statement authorized by the Council of the American Psychiatric Association (February 1965), 122 Am. J. Psych. 454 (October 1965) 2a

93 Cong. Rec. 3357 (1947) 26, 40

Cooperative Commission on the Study of Alcoholism, *Report to the Nation on Alcohol Problems* (Plaut ed. 1967) .. 30, 34, 53-55

Note, 52 Corn. L.Q. 470 (1967) 19, 50, 2h

The Correctional Assn of New York & The International Assn of Chiefs of Police, *Alcohol & Alcoholism: A Police Handbook* (1965) 3, 23g

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Case Note, 16 DePaul L. Rev. 493 (1967) 50

Doctrines and Disciplines of the Methodist Church (1964) 4

Note, 1966 Duke L.J. 545 (1966) 50, 2h

Editorial, *Manual on Alcoholism*, 202 J. Am. Med. Assn 539 (November 6, 1967) 1a

Editorial, *Recent Court Decisions Regarding Imprisonment of Alcoholics*, 197 J. Am. Med. Assn 582 (August 15, 1966) 11g

Gavin, *Discussion*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 94 (June 1962) ... 29

Recent Decision, 54 Geo. L.J. 1422 (1966) 50

Gilbert, *Discussion*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 79 (June 1962) ... 15g

Goff, *Alcoholism and the Administration of Justice* (August 1964) 16g

Goff, *Correction and the Alcoholic*, in *Proceedings of the Department of Health, Education, and Welfare Conference on the Court and the Chronic Inebriate* 21 (April 1965) 27, 15g

Goldfarb, *Roadblocks to Progress in the Treatment of the Chronic Inebriate*, North American Association of Alcoholism Programs Spec. Rep. No. 39 (September 28, 1967) 5g

Hale, *Pleas of the Crown* (circa 1675) 22, 23, 27

Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045 (1944) 26

Harrington, *The Other America* (Penguin ed. 1963) 10g

Hoff, *Alcoholism*, The Encyclopedia of Mental Health 179 (1963) 26

Hospitalization of Patients With Alcoholism, Report of the Board of Trustees to the Members of the AMA House of Delegates, adopted in November 1956, 162 J. Am. Med. Assn 750 (October 20, 1956) 1a

H.R. 6143, 90th Cong., 1st Sess. (1967) 53

H.R. 6326, Title VIII, 90th Cong., 1st Sess. (1967) 53

Page

Comment, 4 Hous. L. Rev. 276 (1966) 50

Recent Development, 13 How. L.J. 203 (1967) 50

Hutt & Merrill, *Is the Alcoholic Immune From Criminal Prosecution?*, 6 Mun. Ct. Rev. 5 (1966), reprinted in 25 Legal Aid Briefacase 70 (1966) 57

Recent Decision, 1966 U. Ill. L. Forum 767 (1966) 50, 3h

Note, 52 Ia. L. Rev. 492 (1966) 50, 3h

Jackson, *Stumbling Block: A Study of Alcohol and Christian Responsibility* (1960) 4

JAMA 75 Years Ago: Inebriety – Illness or Crime?, 202 J. Am. Med. Assn 23 (October 30, 1967) 51

Jellinek, *The Disease Concept of Alcoholism* (1960) 3a

Johns, *A Practical Approach*, in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Conference of Municipal Judges* 52 (October 1959) 31

Johnson, *The Alcohol Withdrawal Syndromes*, Quarterly Journal of Studies on Alcohol Supp. No. 1 at 66 (November 1961) 25

Judice, *Public Intoxication*, 30 Tex. Bar J. 341 (May 1967) 49

Recent Case, 55 Ky. L.J. 201 (1966) 50, 3h

Logan, *May a Man Be Punished Because He Is Ill?* 52 A.B.A.J. 932 (October 1966) 49

Logan, *Why Are We All Here?* in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Regional Conference of Municiapl Judges* 3 (October 1959) ... 20g

Lohman, *Incarceration as a Deterrent*, in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Regional Conference of Municipal Judges* 32 (October 1959) 22g

Note, 27 La. L. Rev. 340 (1967) 50

MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 61 (June 1962) 14g

Page

McCarthy, *Alcoholism: Attitudes and Attacks*, 1775-1935, 315 The Annals of the American Academy of Political and Social Science 12 (1958) 30

Mahoney, *Discussion*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 34 (June 1962) ... 13g

Marden & Silverstein, *The Growing Importance of Criminal Law to the Legal Profession*, 53 A.B.A.J. 511 (June 1967) 49

Miller, *Handbook of Criminal Law* (1934) 22

Murtagh, *The Derelicts of Skid Row*, Atlantic Monthly, March 1962, at 77 ..... 31, 56

Murtagh, *The New York City Program for the Skid Row Alcoholic*, in *Proceedings of Institute on the Skid Row Alcoholic of the Committee on the Homeless Alcoholic, National Committee on Alcoholism* 4 (March 1956) 30g

National Institute of Mental Health, United States Department of Health, Education, and Welfare, *Alcoholism*, Public Health Service Pub. No. 730 (rev. 1963) 3a

National Institute of Mental Health, United States Department of Health, Education, and Welfare, *Alcohol and Alcoholism*, Public Health Service Pub. No. 1640 (1967) 3a

N.Y. State Bar Assn, *Report of the Committee on Public Health* (December 31, 1966) 54

Note, 44 N.Car. L. Rev. 818 (1966) 50

Recent Case, 43 N.D. L. Rev. 551 (1967) 50, 3h

"Opportunity for Urban Excellence," *Report of the Atlanta Commission on Crime and Juvenile Delinquency* (February 1966) 7g

Pittman, *The Chronic Drunkenness Offender: An Overview*, in *Proceedings of the Department of Health, Education, and Welfare Conference on the Court and the Chronic Inebriate* 6 (April 1965) 40, 17g

Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate* (1958) 27, 56, 18g

Plaut, *Summary of Conference* in *Proceeding of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 116 (June 1962) 26, 27

Page

The President's Commission on Law Enforcement & Administration of Justice, *Task Force Report: Drunkenness* (1967). . . . 7, 9g

Ramon, *Radio Interview* (January 17, 1967) 8g

Recommendation for the Admission of Alcoholics to General Hospitals – Reaffirmation of the 1956 Statement, Report G of the Council on Medical Service to the AMA House of Delegates, adopted in November 1966 . . . . . 2a

Reed, M., *The Function of Alcoholics Anonymous*, in "Processing the Alcoholic Defendant," *Report of the Proceedings of the Rocky Mountain Regional Conference of Municipal Judges* 55 (October 1959). 21g

"Rehabilitation of Alcoholics," *Hearings Before the Subcommittee on Health, Education, Recreation of the Committee on the District of Columbia, House of Representatives*, 80th Cong., 1st Sess., on H.R. 496 (1947) 26, 40, 27g

Reid, *Some Medico-Legal Aspects of Alcoholism* (November 1967) 12g

Report of the Committee on Prisons, Probation, and Parole in the District of Columbia (April 1957) 26, 40, 52, 56, 25g

Report of the Minneapolis Task Force on the Homeless Alcoholic (March 1967). 12g

Report of the President's Commission on Crime in the District of Columbia (1966) [cited as *"D.C. Crime Commission Report"*]. . . . . *Passim*

Report of The President's Commission on Law Enforcement & Administration of Justice (1967) [cited as *"U.S. Crime Commission Report"*]. . . . . *Passim*

Roche Laboratories, *Aspects of Alcoholism* (1963) 38

Rubington, *The Chronic Drunkenness Offender*, 315 The Annals of the American Academy of Political and Social Science 65 (January 1958) 27, 19g

Rush, *An Inquiry Into the Effects of Ardent Spirits on the Human Body and Mind* (1784). 51

Comment, 11 St. Lou. L.J. 250 (1967). 50, 5h

Sayre, *Mens Rea*, 45 Harv. L. Rev. 974 (1932). 20

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S. 1515, 90th Cong., 1st Sess. (1967) 53

S. 1740, 90th Cong., 1st Sess. (1967) 53

Smith, *The Alcoholic and the Law* (May 1966) 11g

Comment, 18 S.Car. L. Rev. 504 (1966) 50, 4h

Note, 12 S. Dak. L. Rev. 142 (1967) 50, 4h

Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S. Car. L. Rev. 349 (1967) 19

Stern, *The National Crime Commission's Report on Public Drunkenness: Where Do We Go From Here?*, North American Association of Alcoholism Programs Spec. Rep. No. 40 (September 28, 1967) 1g

The Supreme Court, 1961 Term, 76 Harv. L. Rev. 54 (1962) 38

The Texas Commission on Alcoholism, *Law Enforcement Handbook on Alcohol Problems* 12, 1b, 2b, 3b

Trotter, *Essay, Medical, Philsophical and Chemical, on Drunkenness* (1778) 30

Note, 41 Tul. L. Rev. 140 (1966) 50, 5h

Note, 3 Tulsa L. J. 175 (1966) 50

Recent Development, 11 Vill. L. Rev. 861 (1966) 50, 5h

Vogel, *Psychiatric Treatment of Alcoholism*, 315 The Annals of the American Academy of Political and Social Science 99 (January 1958) 27

Case Comment, 23 Wash. & Lee L. Rev. 402 (1966) 50, 5h

Note, 12 Wayne L. Rev. 879 (1966) 50

Current Decision, 7 Wm. & Mary L. Rev. 394 (1966) 50

World Health Organization Expert Committee on Alcohol and Alcoholism, *Report*, Tech. Rep. Ser. No. 94 (June 1955) 25

World Health Organization Expert Committee on Mental Health, *Report of the First Session of the Alcoholism Subcommittee*, Tech. Rep. Ser. No. 42 (September 1951) 2a

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BRIEF FOR AMICI CURIAE

QUESTION PRESENTED

Whether the conviction of a chronic alcoholic for being found in a state of intoxication in a public place violates the Eighth and Fourteenth Amendments to the United States Constitution.

INTERESTS OF AMICI CURIAE

Chronic alcoholism is a disease. Amici Curiae believe that neither this disease nor behavior that is its inherent symptom, public intoxication is a proper subject for the criminal law.

This case involves a single individual and a single arrest. But this Court's decision will control the fate of an estimated 500,000 indigent alcoholics throughout the country and will vitally affect the lives of their families, relatives, and neighbors. It will determine whether public intoxication will be handled in the future as a public health problem, the only course that offers any hope of success. Also at issue is whether the States and localities will continue to expend the energies of their police personnel on some 2,000,000 arrests for drunkenness each year – one out of every three arrests made – rather than direct them against serious criminal activity. This brief is intended to place the case in this larger context.

Amici strongly endorse the position that public drunkenness and chronic alcoholism are public health problems. Because a decision that would permit the continued prosecution of alcoholics for intoxication would stifle reform of the present system, they support Appellant's contention that the decision below must be reversed.

1. The American Civil Liberties Union, organized in 1920, is a national association dedicated to the preservation and protection of individual civil liberties. The ACLU's local affiliate, the National Capital Area Civil Liberties Union, provided the cooperating attorneys who litigated the *Easter* case,[1] and the ACLU and its affiliates have participated in

[1] *Easter v. District of Columbia*, 209 A.2d 625 (D.C. Ct. App. 1965), *rev'd*, 261 F.2d 50 (D.C. Cir. 1966) (*en banc*). Counsel for Amici Curiae in the instant case represented Mr. Easter and have filed briefs for amici curiae in other similar cases. Counsel for Amici Curiae were also consultants and advisors to The President's Commission on Law Enforcement and Administration of Justice and to The President's Commission on Crime in the District of Columbia.

other cases involving the same issues throughout the country.

2. The American Medical Association, established in 1847, is the national professional organization for physicians. Its objective is to promote the science and art of medicine and the betterment of public health. The AMA is a federation of 54 state medical associations, including the Texas Medical Association. These state medical associations are federations of county medical societies, one of which is the Travis County Medical Society. More than 9,000 of the AMA's 200,000 individual physician members reside in the State of Texas. The AMA officially recognizes alcoholism as a disease that is properly within the scope of medical practice rather than the criminal law.[2] In 1966 the AMA ranked alcoholism with heart disease, mental illness, and cancer as the most serious health problems confronting this country.

3. The Correctional Association of New York, established in 1844, is an organization of private citizens whose purpose is to promote the most efficient and effective use of correctional institutions. In 1965 the Association co-authored, with the International Association of Chiefs of Police, a police handbook on alcohol and alcoholism urging that alcoholism be handled as a health problem.[3]

4. The Methodist Board of Christian Social Concerns, established in 1960 as the successor to the Methodist Board of Temperance and Public Morals, is the official arm of the Methodist Church concerned with current national social policy. The Methodist Church, one of the primary forces behind the temperance movement in the United States and the adoption of the Eighteenth Amendment, recognizes

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[2] See Appendix A.

[3] The Correctional Assn of New York & The International Assn of Chiefs of Police, *Alcohol & Alcoholism: A Police Handbook* (1965).

chronic alcoholism as a disease that requires medical treatment rather than criminal punishment.[4]

5. The North American Association of Alcoholism Programs, organized in 1949, is comprised of 88 official State or local tax-supported programs working in the field of alcoholism, including the Texas Commission on Alcoholism. NAAAP recognizes alcoholism as a disease and opposes use of criminal sanctions in the handling of public intoxication.

6. The North American Judges Association, founded in 1960, is comprised of over 800 local judges in the lower courts in which chronic alcoholics regularly appear charged with public intoxication and other minor related offenses. NAJA believes that handling these people through the criminal courts neither deters nor rehabilitates them.

7. The North Conway Institute, organized in 1954, is an interdenominational ecumenical organization concerned with the problem of alcoholism and how religion can realistically deal with it. The Institute believes that intoxication and alcoholism should be handled as social and public health problems rather than as criminal offenses.

8. The Texas Commission on Alcoholism is an official arm of the Government of the State of Texas comprised of six members who are appointed by the Governor and confirmed by the Senate. The Commission was created by statute in 1953.[5] Section 1 of that statute states, and the Commission believes, that alcoholism is an illness that should be handled by public health procedures rather than as a criminal offense.

9. The Washington D.C. Area Council on Alcoholism, organized in 1947, is a voluntary community health organization supported by the United Givers Fund and private con-

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[4] *Doctrines and Disciplines of the Methodist Church* ¶ 1822.1 (1964). See also Jackson, *Stumbling Block: A Study of Alcohol and Christian Responsibility* (1960).

[5] Article 5561c, § 4, of the Texas Civil Statutes, Acts 1953, 53d Leg., p. 983, ch. 411.

tributions. In 1964 WACA initiated the *Easter* litigation to establish that alcoholism is a public health rather than a criminal problem. WACA has filed briefs as amicus curiae in several other cases in which alcoholism was raised as a defense to public intoxication, and during the past four years it has led a campaign to remove the handling of public drunkenness from the criminal system.

STATEMENT OF THE CASE

I. Proceedings Below

On December 19, 1966, Officer Mauldin of the Austin Police Department observed Appellant Leroy Powell in an intoxicated condition in the 2000 block of Hamilton Street in the City of Austin, and placed him under arrest for violating Article 477 of the Texas Penal Code:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was found guilty and fined $20 in the Corporation Court of the City of Austin on December 20, 1966.

Appellant appealed his conviction to the Travis County Court at Law No. 1 (referred to throughout this brief as the "trial court" or as the "court below"), which held a trial *de novo* on April 5, 1967. Expert psychiatric and other testimony was presented to prove that his public intoxication was an involuntary symptom of the disease of chronic alcoholism. It was established that Appellant is a chronic alcoholic and that his public intoxication is a compulsive symptom of his disease. Appellee, which offered no contradictory evidence, did not dispute these facts in the court below or in its Motion to Dismiss the Appeal to this Court.

A. *Appellant's Life History and Present Condition*

1. Appellant's Life History

Appellant is 66 years old. He is married and has one child, a daughter. Although Appellant sometimes spends nights at home, he usually sleeps in public places, such as the sidewalk, when he gets drunk. He does not support his wife or child.[6]

Appellant worked as a laborer for the City of Austin until he injured his back in 1955. Since then he has been unable to do heavy work. Beginning in 1956 or 1957 he has worked in a tavern shining shoes. He currently earns about $12 per week, which he uses to buy wine.[7]

Appellant began drinking alcoholic beverages in about 1925. His Austin Police Department arrest record shows that he was first arrested there for public drunkenness in 1949, and that he has been arrested for drunkenness at least once every year since 1952. He has been arrested for drunkenness on some 25 other occasions outside Travis County, primarily in Bastrop County.[8]

The fine customarily imposed for drunkenness in Travis County is $20 and in Bastrop County is $25. Appellant is usually unable to pay the fine when he is arrested, and therefore is required to work it off in jail.[9] The record does not disclose how many months he has spent in jail in lieu of paying fines.

Appellant's arrest record is only illustrative of his drinking problem. He testified that he has been "pretty lucky" in not being arrested when he is drunk.[10] The record shows

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[6] A. 34, 36, 37, 42.

[7] A. 34, 35, 37.

[8] A. 35, 36, 50.

[9] A. 23, 36, 41.

[10] A. 35, 36.

that he drinks wine every day and becomes so drunk he passes out about once a week. The only limitation on his consumption of alcohol is his meager income.[11] Appellant took four or five drinks the night before his trial, and another drink at 8 A.M. the morning before his trial. The money for his morning drink was given to him, and he would have had more to drink at that time if he had been given more money.[12]

As a result of constant drinking and intoxication Appellant has been unable to find employment anywhere but at the tavern. He applied for jobs both at the Austin Independent School District and at the State Office Building but was turned down because of his drinking problem.[13]

Appellant's drinking, however, has not threatened harm to any member of the public. Officer Mauldin testified that he was not engaged in loud or boisterous conduct, was not fighting, and did not resist arrest. Apart from a single arrest for disorderly conduct in 1951, all of Appellant's arrests have been for public drunkenness.[14]

As would be expected, alcoholism has impaired Appellant's perception and memory. He testified that he does not al-

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[11] A. 23, 38, 39, 43, 44.

[12] A. 41, 42, 43, 44.

[13] A. 38.

[14] A. 9, 10, 23, 28, 29, 30, 31, 32, 36. Amici are unable to reconcile Lt. Darby's statement (A. 32) that Appellant was arrested for disorderly conduct on March 21, 1951, with the summary of Appellant's arrest records (A. 50) which shows no arrest in 1951. In any event, there is no evidence of record that the reported single char of disorderly conduct resulted from violence or any other activit that might be considered potentially harmful to the public. Alcoholics are frequently arrested and charged with disorderly conduct even though their sole misconduct consists of public intoxication. See The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Drunkenness* 1 n.1 (1967).

ways know where he is after he starts drinking. Indeed, he was unable to recall anything about his arrest for drunkenness on December 19, 1966 – when he started drinking, where he was arrested, whether he talked to Officer Mauldin, or when or how he got out of jail. He could not recall Christmas day, 1966.[15] Whole episodes of his life have been lost in an alcoholic fog.

2. Medical Diagnosis of Appellant's Condition

David Wade, M.D., examined Appellant prior to trial and testified as to his present condition.[16]

After receiving his M.D. degree in 1939, Dr. Wade spent 3 years in a psychiatric residency. He has since specialized in psychiatry and has been especially interested in the problem of alcoholism. He is a Board-certified psychiatrist.[17] Dr. Wade is Chief of Staff at St. Jude's Oak Ridge Hospital, a private psychiatric hospital, about 10 percent of whose patients have an alcoholism problem. He has been the superintendent of two Texas State mental institutions. He currently serves on the staffs of four hospitals in the City of Austin and as a consultant at the Kerrville Veterans Administration Hospital and at the Austin State Hospital. He co-founded a branch at Texas Christian University of the Yale School for Alcoholic Study, and frequently lectures and writes on the subject of alcoholism. In addition, he is a former President of the Texas Medical Association and was on the Association's Board of Counsellors for a term of 9 years.[18]

Based upon his examination of Appellant, including an interview relating to his past history, Dr. Wade concluded that Appellant is a chronic alcoholic. He testified that Ap-

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[15] A. 37, 40, 41.

[16] A. 22.

[17] A. 12, 13, 15.

[18] A. 13, 14, 15.

pellant has a history of excessive drinking dating back to his early years and that he now rarely passes a week without going on an alcoholic binge.[19]

Dr. Wade described Appellant's drinking pattern as "fairly typical of most alcoholics." He buys a bottle of wine with the intention that he will not get drunk, but he usually is unable to stop drinking until he passes out.[20] In Dr. Wade's opinion, Appellant is no longer able to control his behavior because "he has an uncontrollable compulsion to drink." He lacks the will power to resist the constant excessive consumption of alcohol and has not been given medical treatment to enable him to develop this will power.[21]

B. *Appellant's Chronic Alcoholism Is a Disease and His Public Intoxication Is a Symptom of That Disease*

The evidence of record demonstrates that Appellant's drunkenness on December 19, 1966 was the inevitable product of his illness, chronic alcoholism. Dr. Wade testified that the American Medical Association and the National Council on Alcoholism both recognize that alcoholism is a disease. He stated that, while there is disagreement whether alcohol is addicting or habituating, in either event a chronic alcoholic is an involuntary drinker who has lost self-control over his drinking and has an uncontrollable compulsion to drink.[22]

Dr. Wade also testified that Appellant's public intoxication was symptomatic of this disease. Intoxication is, of course, an inherent symptom of alcoholism. Dr. Wade testified that intoxication alters an alcoholic's ability to control his behavior. Losing his sense of values and judgment,

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[19] A. 22, 23.

[20] A. 23.

[21] A. 23, 24.

[22] A. 15, 16, 17, 18, 19, 20, 21, 24.

he frequently will appear in public places while intoxicated. Thus, his presence in public in a state of intoxication is, in Dr. Wade's opinion, as involuntary as his intoxication.[23]

Dr. Wade's opinions are borne out by Appellant's testimony. Appellant stated that he frequently does not know where he is when he is intoxicated. He was unable to remember anything about the events preceding or succeeding his December 19, 1966 arrest.[24]

Dr. Wade pointed out that a chronic alcoholic is subject to two forms of compulsion to drink. The compulsion to take the initial drink, "an exceedingly strong influence" which he is "unable to defy," coupled with the alcoholic's belief that he can control his drinking, makes the first drink inevitable. The alcoholic is also under a compulsion to continue to drink, a compulsion that is uncontrollable unless alcoholic beverages are simply unavailable.[25]

It is probably impossible for an expert witness to describe in lay terms the way in which alcoholism acts upon the individual. The etiology of the disease is not yet understood. Indeed, it was only ten years ago that the medical profession first recognized that delirium tremens are the withdrawal symptoms of alcoholism. But the medical profession is unanimous that the chronic alcoholic drinks involuntarily, as a result of some as yet poorly understood compulsion generated by his disease. No medical authority today suggests that an alcoholic's public intoxication is a product of his freely-exercised volition.

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[23] A. 19, 20, 17.

[24] A. 37, 40, 41.

[25] A. 16, 17, 24, 25, 26, 27.

C. *Appellant Could Be Helped by Appropriate Treatment for His Alcoholism*

Appellant appreciates that he has a drinking problem and wants help. He admitted that he is an alcoholic and is unable to control how much liquor he consumes or where he goes after he becomes intoxicated.[26] His drinking will continue uninterrupted, except by periodic imprisonment, unless treatment is provided.

Dr. Wade testified that an alcoholic can recover from his illness if given proper medical treatment. Large numbers of former alcoholics have been successfully treated.[27] He emphasized, however, that neither confinement in jail nor a monetary fine has any value in treating a chronic alcoholic. He testified that Appellant has not received medical or psychiatric treatment or ever been sent to the State Hospital or referred to Alcoholics Anonymous, notwithstanding the obviousness of his problem. In Dr. Wade's opinion, without proper medical treatment Appellant cannot develop the will power necessary to enable him to resist the constant excessive consumption of alcohol.[28] Appellant's history confirms this opinion.

II. The Trial Court's Findings of Fact and Conclusions of Law

Based upon this uncontradicted evidence the court below entered the following Findings of Fact, adopting Appellant's factual contentions (A. 53):

> "1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

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[26] A. 37, 38, 39.

[27] A. 20.

[28] A. 23, 24, 25.

"2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

"3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

These findings confirmed the views expressed in 1953 by the Texas Legislature in enacting the statute creating the Texas Commission on Alcoholism.

Article 5561c of the Texas Civil Statutes recognizes chronic alcoholism as an illness that is properly handled through public health facilities and programs. Section 1 sets forth the legislative policy:

"Alcoholism is hereby recognized as an illness and a public health problem affecting the general welfare and the economy of the State. Alcoholism is further recognized as an illness subject to treatment and abatement and the sufferer of alcoholism is recognized as one worthy of treatment and rehabilitation. The need for proper and sufficient facilities, programs and procedures within the State for the control and treatment of alcoholism is hereby recognized."

Section 3(c) defines "alcoholic" as including "any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages."

Section 4 of Article 5561c establishes the Texas Commission on Alcoholism, one of Amici Curiae, as an arm of the State government. Among the Commission's duties, as set out in Section 5, are to "focus public attention on" and "promote or conduct educational programs on alcoholism," and to "provide for treatment and rehabilitation of alcoholics."[29]

[29]The views of the Texas Commission on Alcoholism on intoxication and alcoholism are set out in its *Law Enforcement Handbook on Alcohol Problems*, summarized in Appendix B.

Appellant argued[30] in the court below that, given its Findings of Fact, Article 477 was unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution as applied to him. Notwithstanding the undisputed facts and the legislative findings in Article 5561c, the court entered the following Conclusions of Law rejecting this constitutional defense (A. 53):

> "1. The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code."

The court therefore found Appellant guilty as charged and increased his fine to $50.[31]

The court below filed no opinion elucidating its Conclusions of Law. The only possible basis for its decision, however, would appear to be Article 36 of the Texas Penal Code:

> "Neither intoxication nor temporary insanity of mind produced by the voluntary recent use of ardent spirits, intoxicating liquor, or narcotics, or a combination thereof, shall constitute any excuse for the commission of crime."

The Texas courts have consistently held this provision applicable to any product of acute intoxication caused by excessive drinking, with the exception of delerium tremens which is an "involuntary result" of drinking and affords a complete defense to crime.[32] In substance, therefore, the court below held that, although Appellant's public intoxica-

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[30] A. 1-2, 44-45, 51-52, 55-56.

[31] A. 46, 54, 58.

[32] See, *e.g.*, *Evers v. State*, 31 Tex. Cr. Rep. 318, 20 S.W. 744, 18 L.R.A. 421, 37 Am. St. Rep. 811 (1892); *Martinez v. State*, 137 Tex. Cr. Rep. 434, 128 S.W.2d 398 (1939).

tion was involuntary as a matter of fact, it must be deemed to have been "voluntary" as a matter of Texas law.

III. The Appeal to This Court

Having no right to a further appeal within the Texas court system,[33] Appellant filed a jurisdictional statement in this Court under 28 U.S.C. § 1257(2). Probable jurisdiction was noted on October 9, 1967.

SUMMARY OF ARGUMENT

Amici rely on the basic principle of Anglo-American law that only voluntary conduct is subject to criminal sanctions. Under long-settled common law a person cannot be punished for conduct produced by a disability that is recognized as depriving him of the capacity to refrain from his offending behavior. The name of his disability is not important. Neither is its cause. The sole determining factor is whether it deprives him of the capacity to control his conduct.

Insanity has long been judicially recognized as a disease that can deprive a person of the ability to control his behavior. An epileptic's seizure unquestionably excuses conduct that would otherwise be deemed "disorderly." A person forced to consume an excessive quantity of alcohol would not be subject to conviction for public intoxication in any jurisdiction. Similarly, Appellant, whom the trial court found to be unable to control his conduct because of his chronic alcoholism, cannot be punished for a symptom of that disease, public intoxication. As in the case of mental disease, the cause of alcoholism is irrelevant to whether it excuses behavior that would otherwise be criminal. The proper question in both cases is whether the illness in fact

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[33] See Art. 4.03 of the Texas Code of Criminal Procedure.

deprived the defendant of the capacity to control the conduct for which he is prosecuted.

The principle that involuntary conduct cannot be punished as criminal is fundamental in our criminal law. Even statutes prohibiting so-called "public welfare offenses," which do not require criminal intent (a *mens rea*), require that the defendant engage in the act of his own free will (an *actus reus*). No court of final jurisdiction has ever ruled that insanity or any other disease that is recognized as producing involuntary conduct is not a defense to a criminal charge. Punishment of involuntary behavior neither deters the defendant nor protects the public. Such punishment is neither logical nor moral. It serves no socially redeeming purpose and must be condemned as unconscionable by a civilized society.

A conviction that affronts this fundamental principle constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment to the United States Constitution. This is the essence of this Court's ruling in *Robinson v. California* 370 U.S. 660 (1962), that a person may not be criminally punished for being ill, since his illness is not a voluntary act. The United States Court of Appeals for the Fourth Circuit, in *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966), held this principle applicable to facts identical to those presented by this case. That court ruled that the conviction of a chronic alcoholic for being drunk in a public place contravenes the Eighth Amendment. The United States Court of Appeals for the District of Columbia Circuit, in *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966)(*en banc*), likewise has unanimously held that a chronic alcoholic cannot be convicted for being drunk in public because his disease has destroyed his capacity to avoid such conduct.

The court below, taking into consideration all the evidence of record, found as a fact that Appellant's conduct—his public intoxication—was not caused "by his own volition" but by "a compulsion symptomatic of the disease of chronic alcoholism." This disease, it also found, "destroys

the afflicted person's will power to resist the constant, excessive consumption of alcohol." The court nevertheless ruled, as a matter of law, that Appellant is criminally responsible for this involuntary conduct. This decision manifestly imposes cruel and unusual punishment and must therefore be reversed.

Reversal of the lower court's decision would be entirely consistent with the recent recommendations of the U.S. and D.C. Crime Commissions, and is supported by judicial, penal, law enforcement, medical, church, and other community leaders. It would promote the development of proper public health procedures for the handling of intoxication and alcoholism. Affirmance, on the other hand, would stifle recent efforts to reform the present system.

ARGUMENT

This case presents a narrow issue of constitutional law: Do the Eighth and Fourteenth Amendments to the United States Constitution permit a State to punish a chronic alcoholic for appearing in a public place in an intoxicated condition under compulsion of his disease.

No questions of fact remain to be resolved. On the basis of uncontradicted testimony, and supported fully by current medical opinion, the lower court found:

First, that Appellant is a chronic alcoholic;

Second, that Appellant's intoxication on December 19, 1966 was caused by his disease, not by his own volition, and therefore was involuntary; and

Third, that Appellant's appearance in public in an intoxicated condition on December 19, 1966 was symptomatic of his disease, rather than the result of his conscious decision, and therefore also was involuntary.

These Findings of Fact, undisputed by Appellee in its Motion to Dismiss, are binding upon this Court.

Amici do not suggest that the court below misapplied the law of Texas. They agree that Texas law does not now recognize the defense which they believe the Constitution requires.

I. The Eighth and Fourteenth Amendments Proscribe Punishment That Is Found Irrational or Uncivilized When Measured Against Contemporary National Standards.

Because he is a chronic alcoholic, Appellant cannot control his drinking or his appearance in public in an intoxicated condition. His basic contention, which Amici support, is that his conviction for an act he could not avoid committing constitutes cruel and unusual punishment proscribed by the Eighth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment:[34]

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amici do not question the mode of Appellant's punishment. They contend that the State of Texas lacks authority to punish him at all.

The decisions of this Court construing the Eighth Amendment disclose two basic principles underlying the constitutional prohibition against "cruel and unusual punishments." First, the prohibition "is not static" but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S.

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[34] In *Francis v. Resweber*, 329 U.S. 459 (1947), this Court assumed, and in *Robinson v. California*, 370 U.S. 660 (1962), it held, that the Fourteenth Amendment's due process clause incorporates the prohibitions of the Eighth Amendment.

86, 101 (1958).[35] Practices once tolerated may now be found to be "cruel and unusual" in the light of contemporary knowledge. Second, the focus of judicial inquiry in each case is whether, when measured against contemporary national standards, the punishment amounts to intolerable treatment. A form of punishment sanctioned by long usage may nevertheless have become "cruel and unusual" when measured by contemporary standards.

Basic substantive standards of the Eighth Amendment have emerged from a long series of decisions. Certainly such barbarisms as "burning at the stake, crucifixion, breaking on the wheel" and "the torture, the rack or thumbscrew" are forbidden. *In re Kemmler*, 136 U.S. 436, 446 (1890); *O'Neil v. Vermont*, 144 U.S. 323, 363 (1892) (Field, J., dissenting). But this Court has in addition declared that the Eighth Amendment, "to be vital must be capable of wider application than the mischief which gave it birth," and that any punishment that would "shock the sensibilities of men" or "shock public sentiment and violate the judgment of reasonable men" is proscribed. *Weems v. United States*, 217 U.S. 349, 373, 375 (1910); *Jackson v. United States*, 102 F. 473, 488 (9th Cir. 1900).[36] In *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), the Court stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."

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[35]The Kentucky Supreme Court suggested that the Amendment was intended to keep pace "with the progress of humanitarianism." *Weber v. Commonwealth*, 303 Ky. 56, 66, 196 S.W.2d 465, 469 (1946). A United States District Court stated that, since "the Eighth Amendment is to be considered in the light of developing civilization," it is "not necessary to speculate as to what might have been considered cruel and inhuman punishment in 1787." *Ex Parte Pickens*, 101 F. Supp. 285, 288 (D. Ala. 1951).

[36]In *Hayes v. United States*, 112 F.2d 417, 420 (10th Cir. 1940), the court stated that the appropriate test was whether the punishment would "shock the sense of mankind." Similarly, the court in *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960), inquired whether the punishment "shocks a balanced sense of justice."

Most recently, in *Robinson v. California*, 370 U.S. 660 (1962), this Court concluded that, "in the light of contemporary human knowledge," it is cruel and unusual to punish anyone for having a disease. Mr. Justice Douglas in concurring observed that "the Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man," and agreed that "imprisonment for being sick" is as unconstitutional under this standard as "disemboweling a person alive." 370 U.S. at 676.

Measured against these Eighth Amendment standards, Appellant's conviction for public intoxication, an involuntary symptom of his disease, must be reversed.

II. Punishment of Appellant for Public Intoxication Is Neither Rational nor Civilized.

Punishment of one who lacked capacity to control his behavior is inconsistent with our common law tradition and violates contemporary national standards.

A. *Appellant's Conviction Violates Established Common Law Principles of Criminal Responsibility Long Held Basic to Civilized Society.*

The common law has long held that a person's inability to control his behavior is a defense to a criminal charge:[37]

> "The conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choos-

[37] Many legal scholars separate criminal capacity into two essential elements: a volitional act (*actus reus*), which requires the capacity to choose between alternative courses of conduct; and an intent (*mens rea*), which requires the ability to understand their moral consequence and to choose between them on this basis. See, *e.g.*, Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S. Car. L. Rev. 349 (1967); Note, 36 U. Cin. L. Rev. 258 (1967); Note, 52 Corn. L.Q. 470 (1967).

> ing evil rather than good; there can be no criminality in the sense of moral shortcoming if there is no freedom of choice or normality of will capable of exercising a free choice." Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1004 (1932).

One who is incapable of following a different course of conduct is therefore not subject to criminal sanctions:[38]

> "When a person possessing capacity for choice and control, nevertheless breaches a duty of this type he is subjected to the sanctions of the criminal law. He is subjected to these sanctions not because of the act alone, but because of his failure to exercise his capacity to control his behavior in conformity with the demands of society." *United States v. Currens*, 290 F.2d 751, 773 (3d Cir. 1961).[39]

Texas law embodies the same principle:[40]

> "Punishment of crime rests upon the theory that the criminal not only has possession of his will but of

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[38] Cf. Aristotle, *Nichomachean Ethics*, Bk. III, ch. i, at 200 (Odyssey Press 1951):

> "But it is only when a man feels or acts willingly that he deserves praise or blame; feelings or actions that are unwilling are pardoned or even pitied. To distinguish willing from unwilling conduct, therefore, is presumably incumbent upon students of ethics, and will also be of service to legislators in meting out honors and punishments."

[39] See also *Nabob Oil Co. v. United States*, 190 F.2d 478, 480 (10th Cir.), *cert. denied*, 342 U.S. 867 (1951), where the court stated that criminal responsibility requires "deliberate, voluntary and intentional" action.

[40] It is unnecessary in this case to determine whether or not, under Texas law, public intoxication is a "public welfare offense" that does not require proof of *mens rea*. See *Morisette v. United States*, 342 U.S. 246 (1952). In either case an *actus reus* must also be proved, and the court below found that Appellant's public intoxication was not a voluntary act. No court of final jurisdiction has ever held that proof of an *actus reus* is not a prerequisite to conviction for any criminal offense. To do so – and thus to punish involuntary conduct – would be manifestly unjust and uncivilized.

> the power to control it. It is upon this fact that human responsibility must rest." *Evers v. State,* 31 Tex. Cr. Rep. 318, 328, 20 S.W. 744, 747 (1892).

Insanity, of course, is the most familiar instance in which an individual is held not criminally responsible because he does not possess the capacity either to exercise free choice or to control his offending conduct:

> "To understand the defense of insanity one must keep constantly and clearly in mind the basic postulate of our criminal law—in the words of Dean Pound, quoted by Justice Jackson in Morisette, 'a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.' If a man . . . is not a free agent, or not making a choice, or unknowing of the difference between right and wrong, or not choosing freely, or not acting freely, he is outside the postulate of the law of punishment." *Carter v. United States,* 102 App. D.C. 227, 235, 252 F.2d 608, 616 (1957).

Duress has excused criminal responsibility for public intoxication.[41] Sleepwalking,[42] the influence of medication,[43] epilepsy,[44] youth,[45] and kleptomania[46] have likewise been recognized as defenses under this fundamental principle. All produce involuntary behavior, which is not punishable under common law.

Similarly, at common law *involuntary intoxication* negated criminal responsibility. It is settled law throughout the

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[41] *Martin v. State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

[42] *E.g., Bradley v. State,* 102 Tex. Cr. Rep. 41, 227 S.W. 147 (1925); *Fain v. Commonwealth,* 78 Ky. 183, 39 Am. Rep. 213 (1879).

[43] *E.g., Pribble v. People,* 49 Colo. 210, 112 Pac. 220 (1910).

[44] *E.g., People v. Freeman,* 16 Cal. App. 2d 110, 142 P.2d 435 (1943).

[45] *E.g., Allen v. United States,* 150 U.S. 551 (1893).

[46] *E.g., State v. McCullough,* 114 Ia. 532, 87 N.W. 503 (1901).

country that involuntary intoxication is a defense to crime, but voluntary intoxication is not.[47]

It is not necessary to argue at length for this established principle. Nor can there be serious dispute that its contravention would violate contemporary standards of justice. Punishment of involuntary action resulting from illness cannot possibly serve to deter similar conduct in the future, or make the defendant more diligent in the future, or more adequately protect the public, or even reform him. It can only provide a means for inflicting the community's vengeance upon him for having a disease, a purpose our morality does not countenance.[48]

No authority has been found which questions the proposition that *voluntary action* is a prerequisite to culpability in cases involving drunkenness. Lord Hale's *Pleas of the Crown*

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[47]See, *e.g.*, Miller, *Handbook of Criminal Law* § 43, at 141 (1934): "No criminal responsibility attaches for acts committed in a state of involuntary drunkenness, destroying the reason and will."

[48]Samuel Butler recounted the cruelty of punishing the sick in Chapter XI of his satire, *Erewhon*. One unfortunate was convicted of "pulmonary consumption" and sentenced to "Imprisonment, with hard labor, for the rest of your miserable existence." The judge reproached him:

> "It is intolerable that an example of such terrible enormity should be allowed to go at large unpunished. Your presence in the society of respectable people would lead the less able-bodied to think more lightly of all forms of illness; neither can it be permitted that you should have the chance of corrupting unborn beings who might hereafter pester you.
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> * * *
>
> "But I will enlarge no further upon things that are themselves so obvious. You may say that it is not your fault. * * * I answer that whether your being in a consumption is your fault or no, it is a fault in you, and it is my duty to see that against such faults as this the commonwealth shall be protected. You may say that it is your misfortune to be criminal; I answer that it is your crime to be unfortunate."

ch. IV (circa 1675) stated that, while voluntary intoxication provided no excuse for crime, two types of involuntary intoxication would exculpate: intoxication caused by (1) the "stratagem or fraud of another" or by (2) a "habitual or fixed phrenzy [disease]" brought on by persistent voluntary drinking. The legal rules subsequently followed in American jurisdictions can be traced directly to this treatise.[49] But although Lord Hale's legal rules remain intact—as they properly should—courts have reached contradictory conclusions in applying them.

Only one reported decision prior to 1966 clearly recognized chronic alcoholism to be available as a defense to criminal prosecution. In *State v. Pike*, 49 N.H. 399, 407-408, 429-412 (1869), the New Hampshire Supreme Court affirmed the trial judge's submission to the jury of the questions whether the defendant's dipsomania—as chronic alcoholism was then called—was a disease and whether that disease caused his unlawful acts. 49 N.H. at 407-408. The court thus held that chronic alcoholism could deprive a defendant of his criminal capacity.

Judge Doe's opinion in *Pike* rested upon the principle on which Appellant relies:

> "When disease is the propelling uncontrollable power, the man is as innocent as the weapon,—the mental and moral elements are as guiltless as the material. If his mental, moral, and bodily strength is subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease, or by another man, or a brute or any physical force of art or nature set in operation without any fault on his part. If a man knowing the difference between right and wrong, but deprived, by either of those agencies, of the power to choose between them is punished, he is punished for his inability to make the choice—he is punished for incapacity; and that is the very

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[49] See, *e.g.*, *People v. Rogers*, 18 N.Y. 9, 18 (1858).

thing for which the law says he shall not be punished." 49 N.H. at 441-442.

Judge Doe realized that a court must restrict itself to general *legal* principles, and must rely upon the expert testimony of physicians for current *medical* knowledge. He denounced judicial perpetuation of obsolete medical views in the guise of legal rules:

> "Defective medical theories [have] usurped the position of common-law principles.
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> "The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory pretending to be legal authority, cannot appeal for support to our reason or even to our sympathy. The proverbial reverence for precedent, does not readily yield; but when it comes to be understood that a precedent is medicine and not law, the reverence in which it is held, will, in the course of time, subside." 49 N.H. at 438.

The *Pike* case represents the settled law of New Hampshire since 1869.

By contrast, the decision of the court below follows a line of cases in which courts refused, as a matter of law, to recognize that alcoholism is a disease and that a chronic alcoholic's intoxication is involuntary. The case most frequently cited is *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888), in which the North Carolina Supreme Court held that intoxication will not excuse crime even if caused by chronic alcoholism:

> "Voluntary drunkenness does not excuse crime, nor does our law recognize, as excusing, what is called 'dipsomania,' or distinguish between an irresistible impulse for intoxicating drinks and a mere inordinate appetite for them, brought on by long and continual indulgence.
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> * * *
>
> "Nor can we entertain as a defense the insatiable thirst, intensified by long indulgence, which is denominated

'dipsomania' . . ." 100 N.C. at 464-465, 6 S.E. at 660.

The District of Columbia Court of Appeals relied upon *Potts* in the *Easter* case, 209 A.2d at 627, but its rationale was rejected by all eight judges of the United States Court of Appeals for the District of Columbia Circuit. 361 F.2d at 53.

Potts is demonstrably unsupportable in law or fact. The court in *Potts* concluded that, because alcoholism is voluntarily induced (*e.g.*, Appellant presumably took his first drink, some 40 years ago, voluntarily), an alcoholic is morally and legally responsible for all subsequent drinking and its consequences. But in *every* jurisdiction actual insanity and even delirium tremens (which, until the early 1950's, was thought to be a form of temporary insanity produced by alcohol rather than a symptom of alcoholism caused by alcohol withdrawal)[50] have long been accepted as a complete defense to crime, even though produced by what was originally voluntary drinking.[51] This "original sin" approach to alcoholism, unlike insanity and delirium tremens, cannot be justified on any rational basis.

It is apparent from its opinion that the court in *Potts* refused to believe that alcoholism is a disease. In effect, the court resorted to a legal *fiction* that all drinking by an alcoholic must, as a matter of law, be deemed "voluntary" and hence not exculpatory.

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[50] Johnson, *The Alcohol Withdrawal Syndromes*, Quarterly Journal of Studies on Alcohol Supp. No. 1 at 66, 71 (November 1961). Delirium tremens, the severe withdrawal symptoms suffered by chronic alcoholics when they stop drinking, range from convulsions to hallucinations, and "are more dangerous to the life of the individual than are any of the manifestations of withdrawal of morphine." World Health Organization Expert Committee on Alcohol and Alcoholism, *Report*, Tech. Rep. Ser. No. 94, at 6-7, 11 (June 1955).

[51] *E.g.*, *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888); *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539 (1854); *United States v. McGlue*, 26 Fed. Cas. No. 15,679 (C.C.D. Mass. 1851) (Curtis, J.); *United States v. Drew*, 25 Fed. Cas. No. 14,993 (C.C.D. Mass. 1828) (Story, J.).

Professor Jerome Hall has pointed out that "traditional attitudes of hostility towards drunkenness render rational and just determinations more difficult than in insanity cases."[52] He has attributed the "unenlightened" results reached in *Potts* and similar drunkenness cases to the "harsh moral bias" of the courts, which "adds cruelty to misfortune" by "refusing to acknowledge that many defendants are diseased."[53] This bias may have reflected the sparsity of the medical information then available or emanated from the strongly held religious belief that all intoxication is immoral.[54] Whatever its origin, it can no longer be justified.

Medical authorities now recognize[55]—as did the Congress in 1947,[56] the Texas Legislature in 1953, and the court below in its Finding of Facts—that chronic alcoholism is a disabling illness characterized by a compulsion or loss of self-control over the use of alcohol that renders intoxication involuntary.[57]

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[52]Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045 (1944).

[53]*Id.* at 1057, 1060, 1061. This hostility is even more apparent in *Choice v. State*, 31 Ga. 424, 471-482 (1860) and *Goodwin v. State*, 96 Ind. 550, 579 (1884).

[54]See, *e.g.*, Leviticus 10:9; Proverbs 20:1, 23:31, 31:4; Isaiah 5:11, 23:1; Habakkuk 2:5, 2:15; Luke 1:15; 1 Corinthians 6:10; Ephesians 5:18.

[55]Representative medical authorities are collected in Appendix A.

[56]Section 24-501 *et seq.* of the District of Columbia Code, 61 Stat. 744 (1947). See 93 Cong. Rec. 3357 (April 14, 1947); "Rehabilitation of Alcoholics," *Hearings before the Subcommittee on Health, Education, Recreation, of the Committee on the District of Columbia, House of Representatives,* 80th Cong., 1st Sess., on H.R. 496 (1947).

[57]Hoff, *Alcoholism*, the Encyclopedia of Mental Health 179 (1963): "The alcoholic's drinking is a symptom of uncontrollable forces inherent in his illness." Plaut, *Summary of Conference* in *Proceedings of*

Under the common law principles enunciated by Lord Hale, Appellant should have been acquitted. The trial court, in Judge Doe's words, relied upon "an extinct medical theory pretending to be legal authority"—the *Potts* legal fiction—and reached an indefensible result.

The record demonstrates the senselessness of punishing Appellant for his involuntary public intoxication.[58] The frequency with which Appellant has been arrested makes clear that criminal sanctions have served only as a means of inflicting vengeance. His periodic convictions and imprisonment have become mere tradition. He has not been deterred[59] or rehabilitated as a result of their repetition, and his incarceration has not effectively isolated him from the community.

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the Massachusetts Conference on Alcohol, Alcoholism, and Crime 116, 117 (June 1962): The chronic alcoholic's drinking "is very different from the social drinker;" he "drinks for different reasons," he "'needs' the alcohol," his "drinking is out of control," he "no longer conforms." Vogel, *Psychiatric Treatment of Alcoholism,* 315 The Annals of the American Academy of Political and Social Science 99, 100 (January 1958): "For general purposes, alcoholics can be described as those people who drink in a very special way—that is, to excess, compulsively, without control, and self-destructively." See generally Bacon, *Alcoholics Do Not Drink,* 315 The Annals of the American Academy of Political and Social Science 55 (January 1958).

[58]The record evidence in other recent cases contesting the conviction of chronic alcoholics for public intoxication underscores the futility of this practice. See the summaries of the record evidence in the *Driver, Easter, Hill,* and *Hoy* cases in Appendices C-F.

[59]Repeated incarceration actually aggravates the chronic alcoholic's inability to avoid public intoxication. *D.C. Crime Commission Report* at 486; Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate* 1, 42, 51-52, 139-146 (1958); Rubington, *The Chronic Drunkenness Offender,* 315 The Annals of the American Academy of Political and Social Science 65, 66-67 (January 1958); Goff, *Correction and the Alcoholic,* in *Proceedings of the Department of Health, Education and Welfare Conference on the Court and the Chronic Inebriate* 21-24 (April 1965). The American Medical Association has stated that "basic for any and all treatments" for chronic

> "Two policies underlie the distinction in treatment between the responsible and the non-responsible: (1) It is both wrong and foolish to punish where there is no blame and where punishment cannot correct. (2) The community's security may be better protected by hospitalization . . . than by imprisonment." *Williams v. United States*, 250 F.2d 19, 25-26 (D.C. Cir. 1957).

Perpetuating this pattern of prosecution and conviction will neither reform his behavior nor protect the public.

Appellant's future will be bleak, indeed, if this Court holds that Article 477 of the Texas Penal Code may validly be applied to him. After laying out his fine in jail, he will return to the streets and, inevitably, to another alcoholic binge. The Austin Police, who know Appellant well, may permit him to remain free a few days as they have often done in the past, but eventually he will again be arrested, convicted, fined, and returned to jail. This process will be repeated as long as he lives. Any doubt about the inevitability of this future is dispersed by Appellant's testimony and past arrest record, by Dr. Wade's medical diagnosis, and by the histories of Driver, Easter, Hill, and Hoy set out in Appendices C-F. Nothing in the record suggests the possibility of a different future for Appellant or other indigent alcoholics.

Amici do not believe that Appellant is suffering from mental illness or that chronic alcoholism is a form of insanity.[60]

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alcoholism is that "the condition must always be thought of by family and friends as a disease, not as a 'sin' or perversion that can be cured by punishment." American Medical Association, *Today's Health Guide* 462 (1965).

[60] Alcoholism and insanity may, but need not, coincide:

> "There is an unresolved debate as to the number of alcoholics who have psychological or emotional disturbances underlying their alcoholism. Dr. Flemming, about ten years ago at Yale in speaking of hundreds of private cases he had reviewed, estimated this at about 28 percent; in other words, 72 percent were without any serious mental disturbances. Dr. Selden Bacon, at the same time, would like to set this figure much

They do contend, however, that Appellant cannot avoid his public intoxication, and that diseases other than insanity can negate criminal responsibility.

It would make no practical difference if Appellant's public intoxication were the result of insanity or duress, rather than chronic alcoholism. He would have had no greater control over his resulting intoxication. In any of these circumstances, criminal punishment would be as shocking and barbarous as it would be futile.

The highest courts of at least two States have held, and this Court has intimated, that it would be unconstitutional to convict an insane person, in violation of common law principles, for conduct caused by his insanity. *State v. Strasburg*, 60 Wash. 106, 110 Pac, 1020 (1910); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); *Robinson v. California*, 370 U.S. 660 (1962). The Courts of Appeals in the *Driver* and *Easter* cases, and recently other courts, have applied this reasoning in reversing the convictions of chronic alcoholics for public intoxication.

Judicial inquiry should focus on whether the individual could control his behavior. The precise etiology of a disease is not relevant to the ultimate issue of criminal respon-

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higher, stating that there were a great many alcoholics who had serious emotional and psychological difficulties of which their drinking was symptomatic. Some A.A. people, on the other hand, feel that more than 95 percent of alcoholics can recover adequately under group psychotherapy of A.A., leaving 5 percent who might fit into the category of psychiatric, psychological, or emotionally-disturbed people." Gavin, *Discussion*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 94, 95-96 (June 1962).

At least three courts have held that alcoholism is not *per se* insanity. *United States v. Malafronte*, 357 F.2d 629, 632 n.8 (2d Cir. 1966); *United States v. MacLeod*, 83 F. Supp. 372 (E.D. Pa. 1943); *District of Columbia v. Phillips*, Crim. No. DC-855-67 (D.C. Ct. Gen. Sess., April 26, 1967), reprinted in 113 Cong. Rec. H5584 (May 16, 1967) (daily ed.).

sibility.[61] The cause and mechanism of many diseases, including alcoholism, remains unclear. Uncertainty about the cause of a disease, however, does not mean that its recognized effects, particularly the victim's loss of the ability to control his conduct, are without legal significance.

The delay in widespread recognition of alcoholism as a serious disabling disease[62] only underscores the fact that the unconscionable punishment of alcoholics for public intoxication has continued far too long. It provides no justification for perpetuating it.

B. *Criminal Punishment of Alcoholics Is Now Generally Recognized by Informed Authorities as Cruel and Irrational.*

Long in advance of the *Driver* and *Easter* decisions, and before the U.S. and D.C. Crime Commissions and the Cooperative Commission on the Study of Alcoholism urged that the prosecution of inebriates and alcoholics be abandoned, all segments of the community had condemned the

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[61] The Court of Appeals for the District of Columbia Circuit unanimously so held in *Easter*, 361 F.2d at 52.

[62] In 1778 Dr. Thomas Trotter, an Edinburg physician, commented on the reluctance to recognize chronic alcoholism as a disease:

> "Mankind, ever in pursuit of pleasure, have reluctantly admitted into the catalogue of their diseases, those evils which were the immediate offspring of their luxuries. Such a reserve is indeed natural to the human mind; for of all deviations from the paths of duty, there are none that so forcibly impeach their pretentions to the character of rational beings as the inordinate use of spiritous liquors. Hence, in writing of medicine, we find drunkenness only cursorily mentioned among the powers that injure health, while the mode of action is entirely neglected and left unexplained."

Trotter, *Essay, Medical Philosophical and Chemical, on Drunkenness* (1778), quoted in McCarthy, *Alcoholism: Attitudes and Attacks, 1775-1935*, 315 The Annals of the American Academy of Political and Social Science 12 (1958).

practice.[63] Indeed, one searches in vain for any responsible or informed defense of this practice.

In 1962 Judge Murtagh, then Chief City Magistrate of New York, wrote:

> "Today we recoil at the manner in which past generations used burning and whipping to curb crime. Is it not likely that future generations will read of our imprisonment of drunken derelicts with a similar sense of shock and outrage?" Murtagh, *The Derelicts of Skid Row*, Atlantic Monthly, March 1962, at 77, 81.

Three years earlier Judge Johns of the Denver Superior Court charged:

> "that the law as we know it in its rough form—that of a proscribed punishment for a violative act—has broken down and is not functional. The punitive approach to the person afflicted with the disease of alcoholism is as archaic as the medieval outlook that the community once had with respect to insanity, tuberculosis, and leprosy." Johns, *A Practical Approach*, in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Conference of Municipal Judges* 52 (October 1959).

The Conference which Judge Johns addressed concluded that "the alcoholic is a compulsive offender who should be helped by the Court rather than punished," and that "a judge should not be required to incarcerate persons guilty of no offense other than their affliction with the illness of alcoholism." *Id.* at 90.

More recently, Presiding Justice Bernard Botein of the New York State Supreme Court, Appellate Division, criticized the criminal handling of chronic alcoholics as a relic of medieval morality wholly inconsistent with modern concepts of medicine and criminal responsibility:

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[63] Additional supporting material is collected in Appendix G to this brief and in Appendices A and B to Judge Fahy's opinion in the *Easter* case, 361 F.2d at 56-60.

"The community's handling of the chronic drunk reveals the inhumanity and ineffectiveness of dealing with him as a criminal.

* * *

"Such obsolete social philosophy still persists, however, in the ob inate insistence on treating chronic alcoholism—a problem of human inadequacy—as one of crime. In this posture the chronic drunk cannot even muster the dubious dignity or command the pseudo-respect of being regarded as a dangerous criminal. He is treated as human refuse, to be swept off the streets periodically and into the courts, in what Austin MacCormick has termed a 'street cleaning operation'.

* * *

"I have no idea whether the ultimate procedures [for rehabilitation] will eventually save the city money or cost more than presently expended. I don't think we can make the choice on any such basis. A civilized community cannot stand by while the biographies of these people are written in interminable records of criminal convictions.

* * *

"Finally, and speaking as a judge, our courts should not serve as disposal centers for cleaning the streets of chronic drunks; nor should judges be constrained by present conditions to impose frequently repeated prison terms resulting in what is virtually a sentence to life imprisonment on the installment plan." Botein, *Speech to the Conference on the Handling of Offenders in the City of New York* 11-13, 16-17 (1965).

In light of these and many similar statements by correction officials, sociologists, physicians, judges, and other community leaders throughout the country, collected in Appendix G, repeated conviction of chronic alcoholics for public intoxication cannot be considered a "civilized" practice that conforms to "standards of decency that mark the progress of a maturing society." Such convictions undermine "the dignity of man." See *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

These prevailing views were reflected in the conclusions of the *Report of The President's Commission on Law Enforcement and Administration of Justice* (the "*U.S. Crime Commission Report*") which earlier this year pointed out:

> "The criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender." *U.S. Crime Commission Report* at 235.

The Commission therefore recommended that "Drunkenness should not in itself be a criminal offense." *Id.* at 236.

The conclusions announced just a few weeks before by the *Report of the President's Commission on Crime in the District of Columbia* (the "*D.C. Crime Commission Report*") were more strongly stated. The D.C. Crime Commission stated that 44,218 arrests were made in 1965 for violations of the District of Columbia public intoxication law. "These arrests reflect the essential inability of the police, courts and prisons to deal effectively with what is basically a major health problem in the District and throughout the United States—chronic alcoholism." *D.C. Crime Commission Report* at 474.

> "The practice of dealing with destitute public inebriates as criminals has proved to be expensive, burdensome and futile. * * *
>
> "Moreover, criminal procedures did not serve as a deterrent. * * *
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> * * *
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> "The resort to criminal sanctions has completely failed. Periodic commitments to a penal institution were a misguided solution, failing to meet either the alcoholic's immediate health needs or the more basic problems underlying his illness." *Id.* at 485-486.

The Commission concluded, at 490, that "The bankruptcy of the law enforcement approach to public intoxication is clear":

> "For these unfortunate people, simple humanity demands that we stop treating them as criminals and

> provide voluntary supportive services and residential facilities so that they can survive in a decent manner." *Id.* at 501.

It therefore recommended that drunkenness alone no longer be a criminal offense in the District of Columbia. *Id.* at 496-497.

Only last month the Cooperative Commission on the Study of Alcoholism issued its *Report to the Nation on Alcohol Problems* (Plaut ed. 1967), reflecting five years of intensive work. The Cooperative Commission termed the repeated arrest of derelict alcoholics for public intoxication "particularly inhumane." *Id.* at 22.

> "Heart disease, cancer, schizophrenia, and delinquency are not completely understood either, yet a community which responded to these conditions as it responds to problem drinking would be considered medieval and a national disgrace." *Id.* at 37.

It concluded that "The infamous 'drunk tanks' found in almost all city jails are instances of barbaric mistreatment." *Id.* at 61.

Chapter 5 of the Cooperative Commission Report, entitled "The Special Problem of Public Drunkenness," flatly condemns the present system:

> "The traditional handling by the police, the court, and jail systems of the very large number of persons found drunk on the streets is inhuman as well as ineffective. There is general agreement that the current 'revolving door' system of repeated arrests and jailings does not alter the drinking behavior of any significant number of problem drinkers, and that it is not effective either as a deterrent or treatment. Many questions have been and are being raised about the constitutionality of treating such persons as criminals. If a man's drunkenness is part of his illness – and thus a non-voluntary act – he should be treated as a sick person and not as a criminal. Clearly it is not a crime to suffer from alcoholism, a characteristic of which is the inability to control one's drinking;

thus it seems bizarre, inappropriate, and unconstitutional to punish an individual for being intoxicated.

"In addition, the present handling of public drunkenness offenders is often demoralizing to the police, judicial, and jail personnel. It is an immense economic drain – in terms of men, time, and space – on these agencies. Furthermore, it seriously undermines the professional character of the work of policemen, judges, district attorneys, and others, and often makes a mockery of the American judicial system. In most courts the average time spent by the judge in the 'trial' and sentencing of each public drunkenness offender probably is less than three minutes. This system of handling defendants undoubtedly violates the traditional American conception of 'due process of law.'

"PUBLIC DRUNKENNESS SHOULD BE APPROACHED AS A MEDICAL-SOCIAL RATHER THAN AS A LEGAL-CRIMINAL PROBLEM

"There is an immediate need to find substitutes for the current legal handling of public drunkenness. Police, judges, and prison officials generally do not view public drunkenness offenders as criminals, but they are trapped in the present system by the absence of any alternatives. Since the public wants intoxicated persons removed from the streets, other means of accomplishing this are needed." *Id.* at 110-111.

Measured by contemporary national standards, therefore, Appellant's conviction must be adjudged "cruel and unusual" and reversed.

III. Reversal Is Compelled by *Robinson v. California*

In *Robinson v. California*, 370 U.S. 660 (1962), this Court struck down as unconstitutional on its face a California law making it a crime to be addicted to narcotics. Amici do not contend that Article 477 of the Texas Penal Code is uncon-

stitutional on its face. Amici do contend that, as now interpreted to apply to involuntary intoxication by a chronic alcoholic, it is unconstitutional as thus applied. The fact that Article 477 punishes a symptom (intoxication) rather than the disease by name (chronic alcoholism) affords no basis for distinguishing *Robinson*.

This Court concluded in *Robinson* that California's "addiction" statute imposed "cruel and unusual punishment" in violation of the Eighth and therefore the Fourteenth Amendment. The Court noted that mental illness, leprosy, and venereal diseases – all of which were once regarded as criminal – could no longer be punished as crimes. The State of California had admitted that a narcotic addict is "in a state of mental and physical illness," and the Court concluded that narcotic addiction is in the "same category" as these other diseases and therefore held the statute unconstitutional. 370 U.S. at 666-667.

The full impact of *Robinson* emerges clearly from the separate opinions of three Justices.[64] Mr. Justice Douglas in concurring asserted that an addict "is under compulsions not capable of management without outside help," 370 U.S. at 671, and concluded:

> "This prosecution has no relationship to the curing of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than with providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." 370 U.S. at 677-678.

Mr. Justice Clark interpreted the California statute as applying only to a "volitional addict" who had not yet lost self-control over use of narcotics. In his view, the law did not apply to "involuntary addicts." His disagreement with the majority rested on this narrow reading of the statute.

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[64] Mr. Justice Harlan concurred on grounds not relevant here. 370 U.S. at 678.

He did not dispute its conclusion that the punishment of involuntary addiction is unconstitutional. 370 U.S. at 679-85.

Mr. Justice White construed the California statute as punishing repeated or habitual *use* of narcotics rather than the status of addiction. Viewing use and addiction as inseparable, he feared that the majority opinion would also prohibit criminal punishment for the use of narcotics. Justice White concluded that the California statute applied only to an "incipient" or "voluntary" addict but admitted that, if it were construed to punish the involuntary addict, "I would have other thoughts about this case." 370 U.S. at 685-689.

In short, disagreement centered upon the proper interpretation of the California statute. No Justice disputed the basic constitutional principle, applied by the majority, that the Eighth Amendment prohibits conviction of a sick person who is acting under a compulsion and has lost the power of self-control. This, of course, is precisely the situation presented by this case.[65]

Concededly, the majority in *Robinson* interpreted the California statute as punishing only the condition of addiction. It did not have to decide whether the Eighth Amendment proscribes criminal punishment of a person who involuntarily exhibits a symptom of that condition, *e.g.*, who repeatedly uses narcotics. The majority opinion makes clear, however, that to punish the symptoms of a disease would likewise be unconstitutional. Although recognizing the broad powers of the States to combat the narcotic traffic, 370 U.S. at 664, the majority nowhere stated that a State could convict an

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[65] The brief of the State of California in *Robinson* conceded that alcoholism is an illness:

> "'Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. *So is an alcoholic.*'" 370 U.S. at 667 n.8 (Emphasis added.)

addict whose procurement, possession, or use of narcotics was caused by his addiction. Its only reference to narcotics addicts is a statement that the States might provide for civil treatment of addicts. 370 U.S. at 665. Nor did the majority seek to dispell Justice White's concern that its decision would preclude conviction of narcotics addicts for procurement, possession, or use of drugs.[66] 370 U.S. at 688. One commentator has reached the same conclusion. *The Supreme Court, 1961 Term,* 76 Harv. L. Rev. 54, 146 (1962).

Moreover, Appellant is being punished as much for his continuing condition of *alcoholism* as for his public intoxication on any given occasion. The court below viewed his intoxication on December 19, 1966 as a single, isolated incident. But this view is neither required by judicial precedent nor supportable in fact.

In *O'Neil v. Vermont*, 144 U.S. 323 (1892), the appellant had been convicted on 307 separate charges of selling liquor

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[66] One distinction between the use of narcotics and the consumption of alcohol is also important. Non-medicinal use of narcotics is illegal throughout the United States. Consumption of alcohol, on the other hand, is legal (with certain restrictions) in almost every jurisdiction and the *abstainer* is often a social outcast. One can quite easily become a chronic alcoholic without violating the law, but only rarely does an addict become addicted solely as a result of legal (*i.e.*, medical) use of narcotics. Nor is the means by which a chronic alcoholic becomes addicted to alcohol generally considered reprehensible:

> "The custom of drinking, one of America's leading social forms, has become a habit in both leisure and business hours. Acceptance of daily low or high alcoholic intake determines, in part, the exposure to the risk of alcoholism. For the person who attempts to abstain where drinking is the rule, social pressure stands ready to challenge will power and determination. Being sober while others drink is both difficult and perturbing. The abstainer cannot help feeling different and uneasy. If he succeeds in not conforming to the drinking in progress, a greater discomfort awaits him: he is no longer welcome because he does not seem 'sociable' anymore." Roche Laboratories, *Aspects of Alcoholism* 31 (1963).

without a license. A fine of $20 for each offense had been imposed or, in lieu thereof, a sentence of three days in jail for each $1 of fine – a total of $6,140 in fines or 19,914 days (over 54 years) in jail. The Court majority did not reach the merits of the appellant's constitutional claim for it held that the Eighth Amendment was not applicable to the States – a holding repudiated by *Robinson*. Justices Field, Harlan, and Brewer in dissent argued that the appellant's aggregate punishment was unconstitutional. They realistically viewed his sentence as a whole, rather than fragmenting it. This Court cannot ignore the painful fact that Appellant is in effect serving a continuing periodically renewed sentence for his *alcoholism*, under which he has already spent substantial time in jail.

Appellant's illness cannot be separated from its symptoms.[67] Those familiar with chronic alcoholism – correctional officials, educators, physicians, and judges – frankly concede that the law today punishes *chronic alcoholism* as a crime. The late Donald Clemmer, former Chairman and Director of the District of Columbia Department of Corrections, informed Congress in 1947 that about 63 percent of the jail commitments that fiscal year were, in his words, "for alco-

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[67] That chronic alcoholism cannot in law or fact be separated from intoxication was recently recognized in a labor arbitration award:

> "Problem drinkers do not deliberately or willfully become drunk. They are compulsive drinkers and the control of drinking is beyond their reach. These people are alcoholics and since the Daily News recognizes it as a disease, one must recognize that symptomatic in this type of disease is the failure of the individual to voluntarily control his drinking. An alcoholic drinks because he has to, not because he wants to. No employee deliberately drinks so he can lose his job. In other words, he does not go out of his way to drink in order to get fired. It is a compulsion, not a willful act." *News Syndicate Co., Inc.*, 44 L.A. 308, 311 (1964).

holism."[68] In the House debates on the 1947 act to provide treatment for alcoholics in the District of Columbia, Congressman Miller noted that in the District "there are a great many arrests for alcoholism."[69] Mr. George W. Randall, Director of the North Carolina Department of Prisons, described the petitioner in the *Driver* case as one of the "unfortunates whose only offense is succumbing publicly to the disease of alcoholism." 356 F.2d at 765.

Dr. David Pittman, Professor of Sociology at Washington University in St. Louis, has reported that "America continues to clutter its courts and jails with individuals whose 'crime' is a physical and social illness."[70] The former Chairman of the American Medical Association's Committee on Alcoholism, Dr. Marvin Block, once warned that "One cannot legislate against a disease" and emphasized "the importance of regarding alcoholism as an illness rather than a violation of the law."[71] The *Report of the Committee on Prisons, Probation, and Parole in the District of Columbia* 131 (April 1957) emphasized that "the real judicial concern" should be "not a specific offense of intoxication, but the chronic condition of human deterioration." The U.S. and D.C. Crime Commissions and the Cooperative Commission likewise concluded that the real problem is one of alcoholism, not merely public intoxication.

These experts, and many others, recognize Appellant's convictions for what they really are—punishment for his chronic

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[68] "Rehabilitation of Alcoholics," *Hearings Before the Subcommittee on Health; Education, Recreation of the Committee on the District of Columbia, House of Representatives,* 80th Cong., 1st Sess., on H.R. 496, at 8 (1947).

[69] 93 Cong. Rec. 3357 (1947).

[70] Pittman, *The Chronic Drunkenness Offender: An Overview,* in *Proceedings of the Department of Health, Education and Welfare Conference on the Court and the Chronic Inebriate* 6, 14 (April 1965).

[71] Block, *Alcoholism: Its Facets and Phases* 60, 283-284 (1965).

alcoholism. Neither this Court, nor any other, can ignore the fact. The involuntary exhibition of the symptoms of a disease is no more blameworthy than having the disease. It is as intolerable to punish the one as the other.

No one can doubt that it would be unconstitutional to punish a person for having a common cold or, accordingly, for sneezing in public. On the same basis, it would be unconstitutional to make epilepsy a crime, as the Supreme Court recognized in *Robinson*, or to imprison an epileptic for suffering a fit in public. If chronic alcoholism cannot be made criminal because it is a disease, chronic alcoholics cannot be punished for succumbing to it in public.

IV. The Rationale of *Driver* v. *Hinnant* and *Easter* v. *District of Columbia* Should Be Followed in This Case.

The criminal statutes under which Joe B. Driver and DeWitt Easter were convicted are indistinguishable from Article 477 of the Texas Penal Code. The unanimous decisions of the Fourth and District of Columbia Circuits accordingly warrant careful attention.

A. *The Driver Case*[72]

Prior to his convictions in the Durham County Court for being drunk in public[73] on December 18 and 19, 1963, Joe B. Driver had been arrested more than 200 times for public intoxication or related offenses. He had spent 25 of the last 36 years of his life in jail. Because he had been convicted on similar charges three times during 1963, Driver was sen-

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[72] A more complete summary of the facts of this case appears in Appendix B.

[73] Section 14-335, N.C. Gen. Stat., provides:

> "If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting . . . he shall be guilty of a misdemeanor . . . ."

tenced to the statutory maximum of 2 years in jail. The North Carolina Supreme Court affirmed, rejecting his claim that his convictions and sentence violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the North Carolina Constitution. *State v. Driver*, 262 N.C. 92, 136 S.E.2d 208 (1964).

Driver later filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. That court found that Driver was a "chronic alcoholic" in that he had lost self-control with respect to the use of alcoholic beverages and was in need of medical and rehabilitative treatment, but it concluded that his conviction and sentence did not contravene the Eighth Amendment. *Driver v. Hinnant*, 243 F. Supp. 95 (E.D.N.C. 1965).

The District Court's judgment was unanimously reversed by the United States Court of Appeals for the Fourth Circuit. *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966). Accepting the finding that Driver was a chronic alcoholic, the Court of Appeals ruled that he could not constitutionally be convicted for public intoxication since his "drunken public display [was] . . . involuntary as the result of disease." The court's holding is explained in the following paragraphs:

> "This addiction - chronic alcoholism - is now almost universally accepted medically as a disease. The symptoms, as already noted, may appear as 'disorder of behavior'. Obviously, this includes appearances in public, as here, unwilled and ungovernable by the victim. When that is the conduct for which he is criminally accused, *there can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine.*
>
> "Although his misdoing objectively comprises the physical elements of a crime, nevertheless no crime has been perpetrated because the conduct was neither actuated by an evil intent nor accompanied with a consciousness of wrongdoing, indispensable ingredients of a crime. Morissette v. United States, 342

> U.S. 246, 250-52 (1952). Nor can his misbehavior be penalized as a transgression of a police regulation - malum prohibitum - necessitating no intent to do what it punishes. The alcoholic's presence in public is not his act, for he did not will it. It may be likened to the movements of an imbecile or a person in a delirium of a fever. None of them by attendance in the forbidden place defy the forbiddance." 356 F.2d at 764. (Emphasis added.)

The Court of Appeals concluded that *Robinson* "sustains, if not commands" its decision even though Driver was convicted for the "act" of being intoxicated in public and not for the "status" of being a chronic alcoholic.[74] 356 F.2d at 764-765.

B. *The Easter Case*[75]

DeWitt Easter was convicted for public intoxication on September 29, 1964.[76] A heavy drinker since the 1930's, Easter had progressively lost control of his life as a result of his inability to govern his consumption of alcohol. He had previously been arrested approximately 70 times for public intoxication, including 12 arrests in 1963.

The trial court ruled that whether Easter was a chronic alcoholic was irrelevant to his culpability, and held him guilty as charged. He received a suspended sentence of 90 days. On appeal, the District of Columbia Court of Appeals conceded that Easter's "chronic alcoholic condition" required

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[74] A different three-judge panel of the Fourth Circuit reiterated the *Driver* holding in *Lewis v. Celebrezze*, 359 F.2d 398, 399-400, (4th Cir. 1966).

[75] A more complete summary of the facts of this case appears in Appendix C.

[76] Section 25-128 of the D.C. Code provides:

> "No person shall in the District of Columbia . . . be drunk or intoxicated in any street, alley, park, or parking. . . ."

treatment, but held that alcoholism induced by persistent voluntary indulgence does not excuse public intoxication, relying on the old *Potts* case. Asserting that Easter had been convicted for the act of being intoxicated in public and not for the status of being a chronic alcoholic, the court also rejected the contention that his conviction violated the Eighth Amendment. *Easter v. District of Columbia*, 209 A.2d 625 (D.C. Ct. App. 1965).

The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, unanimously reversed Easter's conviction. All eight judges agreed that under common law principles Easter, a chronic alcoholic, could not be convicted for behavior that was the involuntary product of his disease. Four judges thus found it unnecessary to reach his constitutional argument. The remaining four judges, however, concluded in addition that his conviction for public intoxication contravened the Eighth Amendment:

> "We hold, therefore . . . that the public intoxication of a chronic alcoholic lacks the essential element of criminality; and *to convict such a person of that crime would also offend the Eighth Amendment.*" 361 F.2d at 55. (Emphasis added.)

No judge disputed this conclusion.

C. *Other Recent Decisions*

Two other Courts of Appeals have indicated agreement with the *Driver* and *Easter* decisions.

In *Fultz v. United States*, 365 F.2d 404 (6th Cir. 1966), the Court of Appeals reviewed the conviction of an indigent defendant who had pled guilty to a charge of bank robbery and had been sentenced to 10 years' imprisonment. The defendant experienced delirium tremens for several days after his arrest. A mental examination disclosed that he "had a long history of periodic, severe alcoholism, and prolonged and immoderate use of drugs," but he was found competent to stand trial. After only 15 minutes' consultation his court-

appointed attorney entered a plea of guilty which the trial judge accepted without further inquiry.

The Court of Appeals held that the trial judge had acted improperly, describing *Driver* and *Easter* as "the recent leading cases holding that chronic alcoholism may be a defense to a charge of unlawful conduct, because of lack of responsibility on the part of one so afflicted." 365 F.2d at 407. It held that the guilty plea should not have been accepted without first investigating the circumstances under which it was made and determining that it was made voluntarily with an understanding of the nature of the charge.

In *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965), the Court of Appeals, accepting modern medical knowledge regarding alcoholism, held that a chronic alcoholic cannot be required to refrain from drinking as a condition of probation. Convicted for violating the Dyer Act, Sweeney was placed on probation on the condition that he "refrain from the use of alcoholic beverages in any form." Six months later Sweeney was arrested for violating this condition and ordered to begin serving his original sentence. He brought an action under 18 U.S.C. § 2255 contending that, because he was a chronic alcoholic, the condition was unreasonable and therefore that his probation had been unjustly revoked. The Court of Appeals accepted his contention:

> "It appears from the record that when probation was granted, the district court knew petitioner's history of chronic alcoholism, and had indications of its pathological nature. We think consequently the probation condition, under the facts of this case, would be unreasonable[2] as impossible if psychiatric or other expert testimony was to establish that petitioner's alcoholism has destroyed his power of volition and prevented his compliance with the condition.

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[2] In Robinson v. State of California, 370 U.S. 660 (1962), the Supreme Court, in striking down a California statute which,

> as construed, made the 'status' of narcotic addiction a criminal offense, illustrated why, on the record before us, we think the probation condition could be unreasonable. . . ." 353 F.2d at 11. (Footnote in original.)

Under this same reasoning, the conviction of a chronic alcoholic for public intoxication is unconstitutionally unreasonable.[77]

Two intermediate appellate courts and one trial court in three States have recently followed the *Driver* and *Easter* decisions. In July 1967 the Superior Court of Fulton County, Georgia (which includes the City of Atlanta) reversed the conviction of a chronic alcoholic for his public intoxication, relying upon both common law and constitutional grounds. *Dunlap v. City of Atlanta*, Fulton County, Ga., Sup. Ct. No. B-29126 (July 17, 1967), reprinted in 113 Cong. Rec. H11089 (August 23, 1967) (daily ed.). In August the Pennsylvania Court of Common Pleas in Philadelphia, in ruling upon petitions for habeas corpus, held that "habitual intoxication is an illness, and as such may not constitutionally be made a criminal offense." *Lee v. Hendrick*, Pa. Common Pleas Ct. (Phil.) No. H.C.-0075 (August 31, 1967) digested in 1 BNA Crim. L. Reptr. 2364 (September 20, 1967), reprinted in 113 Cong. Rec. H15368 (November 15, 1967) (daily ed.). And in October the Circuit Court for Montgomery County, Maryland, reversed the conviction of a chronic alcoholic for public intoxication, holding:

> "1. That on a charge of public intoxication under Article 27, Section 123, a defendant may assert chronic alcoholism as a defense and introduce evidence in support of that defense . . . .
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> * * *

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[77] See also *Gibbs v. Blackwell*, 354 F.2d 469, 471 (5th Cir. 1965), in which the Court of Appeals ruled that the allegation that a prisoner "lost over seven years' time on parole because he became drunk on three occasions . . . raises serious constitutional questions" and remanded the case for development of a full record.

> "5. That to incarcerate or otherwise punish a chronic alcoholic for being in a state of intoxication in a public place constitutes cruel and unusual punishment and is in violation of the Eighth Amendment . . . ."

State v. Ricketts, Montgomery County, Md., Cir. Ct. Crim., No. 8787 (October 25, 1967), reprinted in 113 Cong. Rec. S15974 (November 7, 1967) (daily ed.).

The law in California appears to be unsettled. In the *Budd* case, the ruling of the Municipal Court for the Oakland-Piedmont Judicial District that alcoholism is not a defense to a charge of public intoxication was affirmed without opinion by the Appellate Department of the Superior Court. The California Supreme Court and this Court denied petitions for a writ of certiorari. *Budd v. California*, 385 U.S. 909 (1966). While the petition was pending in this Court, however, the Municipal Court for the Los Angeles Judicial District ruled that the Constitution requires acquittal of a chronic alcoholic charged with public intoxication. *State v. Dobney*, Los Ang. Mun. Ct. No. D475555 (May 16, 1966), reprinted in 112 Cong. Rec. 22718 (September 22, 1966) (daily ed.), *rev'd on other grounds*, Los Ang. Super. Ct. App. Div. No. CRA 6963 (October 14, 1966). The California Supreme Court has not yet confronted the issue.

Similar cases in at least five other jurisdictions are at various stages of appeal.[78]

In *State v. Freiberg*, 35 Wis. 2d 480, 151 N.W.2d 1 (1967), alcoholism was recognized as a disabling disease in the context of a different criminal charge. The defendant was charged with failure to support his child and claimed in de-

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[78] *Seattle v. Hill*, Wash. Sup. Ct. No. 39050, argued on March 28, 1967; *People v. Hoy*, 3 Mich. App. 366, 143 N.W.2d 577 (Ct. App. 1966), on appeal, Mich. Sup. Ct. No. 51563, argued on November 7, 1967; *Commonwealth v. Owens*, Middlesex, Mass., Super. Ct. No. 74393; *State v. Fearon*, Minn. Sup. Ct.; *Columbus v. Kelley*, Ohio 10th Dist. Ct. App., argued on October 30, 1967.

fense that "he is a chronic alcoholic and that this condition is an illness or a disease that prevented him from keeping any employment and from supporting his family." The court agreed this would be a valid defense:

> "If sufficient facts were established to show that the defendant was an alcoholic in a medical sense, and that such alcoholism prevented the defendant from working, we would conclude that the defendant lacked the physical capacity to work." 35 Wis. 2d at 484, 151 N.W.2d at 3.

The defendant was convicted, however, when he failed to present competent testimony to establish his defense.

Finally, in two recent civil cases alcoholism has been recognized as a disabling disease. In *Lewis v. Celebrezze*, 359 F.2d 398 (4th Cir. 1966), an action brought to obtain disability benefits under the Social Security Act, the court held that:

> "where chronic alcoholism alone or in combination with other causes, is shown to have resulted in a medically determinable disability, rendering gainful employment impossible, recovery of benefits under the Act ought not be barred on account of the origin of the disability." 359 F.2d at 400.

Lewis failed to make the required showing. The plaintiff in *Schompert v. Celebrezze*, W.D.N.Y. Civil No. 10,937 (May 24, 1966), reprinted in 112 Cong. Rec. 22718 (September 22, 1966) (daily ed.), however, was able to establish a clear disability resulting from his alcoholism and prevailed in his action for payments under the Social Security Act.

D. *Legal Commentators Have Approved of the Driver and Easter Decisions*

The President of the American Bar Association recently noted that:

> "Francis A. Allen, Dean of the University of Michigan Law School, makes the point that the criminal law should not be relied upon to perform social

> services, such as dealing with the problem of habitual drunkards."

He stated that the *Robinson, Driver,* and *Easter* decisions "dramatize the need for new approaches in dealing with such problems."[79]

The Executive Director of the North American Judges Association asked rhetorically:[80]

> "Weren't police hired to protect life and property, rather than to move drunks in and out of courts and jails?"

He answered that:

> "any such neglect was accentuated and perpetuated by an archaic legal system that permits such cruel and unusual punishment of sick persons to flourish into the major item of business for police and courts."

After describing the *Driver* and *Easter* decisions, he concluded by calling upon the Bar to avoid "the aversion to controversy and the restraint of social acceptability that hamper pioneering probes" and "to provide the leadership that the rest of society expects from the legal profession" in dealing with "this grave sociolegal problem of alcoholism."[81]

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[79] Marden & Silverstein, *The Growing Importance of Criminal Law to the Legal Profession,* 53 A.B.A.J. 511, 514 (June 1967).

[80] Logan, *May A Man Be Punished Because He Is Ill?,* 52 A.B.A.J. 932 (October 1966).

[81] *Id.* at 937. Judge C. Raymond Judice, President of the Texas Association of Municipal Judges, has pointed out the magnitude of the public drunkenness problem in Houston and suggested that treatment programs are urgently needed. Judice, *Public Intoxication,* 30 Tex. Bar J. 341 (May 1967).

The *Driver* and *Easter* cases have provoked a multitude of law review comments in the past two years.[82] These comments applaud the results reached in those cases as just and humane.[83] Although most commentators recognize that the transition from criminal to public health handling of alcoholism will create initial problems, they uniformly emphasize that this change is imperative.

V. Reversal of the Lower Court's Decision Will Benefit the Nation

The lower court's decision is inconsistent with sound social policy. Reversal will inevitably bring about a transfer of responsibility for public intoxication and chronic alcoholism from law enforcement officials to public health agencies, a result that is long overdue. Affirmance of Appellant's conviction would undermine the progress that has been made

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[82]Case Note, 19 Ala. L.Rev. 183 (1966); Case Note, 16 Am. Univ. L.Rev. 295 (1967); Casenote, 8 Ariz. L.Rev. 351 (1967); 20 Ark L. Rev. 365 (1967); Case Comment, 46 B.U.L.Rev. 409 (1966); Recent Decision, 2 Brook. L.Rev. 324 (1967); Case Note, 15 Cath. U. L.Rev. 259 (1966); Note, 36 U.Cin.L.Rev. 258 (1967); 2 Colum. J. of Law & Soc. Prob. 109 (1966); Note, 52 Corn. L.Q. 470 (1967); Case Note, 16 DePaul L.Rev. 493 (1967); Note, 1966 Duke L.J. 545 (1966); Recent Decision, 54 Geo. L.J. 1422 (1966); Comment, 4 Hous. L.Rev. 276 (1966); Recent Development, 13 How. L.J. 203 (1967); Recent Decision, 1966 U. Ill. L.Forum 767 (1966); Note, 52 Ia. L.Rev. 492 (1966); Recent Case, 55 Ky. L.J. 201 (1966); Note, 27 La. L.Rev. 340 (1967); Note, 44 N.Car. L.Rev. 818 (1966); Recent Case, 43 N.D. L.Rev. 551 (1967); Comment, 18 S.Car. L.Rev. 504 (1966); Note, 12 S.Dak. L.Rev. 142 (1967); Comment, 11 St. Lou. L.J. 250 (1967); Note, 41 Tul. L. Rev. 140 (1966); Note, 3 Tulsa L.J. 175 (1966); Recent Development, 11 Vill. L.Rev. 861 (1966); Case Comment, 23 Wash. & Lee L.Rev. 402 (1966); Note, 12 Wayne L.Rev. 879 (1966); Current Decision, 7 Wm. & Mary L.Rev. 394 (1966).

[83]Representative comments from these articles are collected in Appendix G.

during the past two years following the *Driver* and *Easter* decisions.

Recognition by this Court of alcoholism as a defense to public intoxication will not stifle the legitimate interest of the States and localities in protecting their citizens against harm. Indeed, by providing proper treatment for chronic alcoholics the States in the long run will protect these interests far more effectively than at present.

A. *Health Services to Alcoholics Will Be Improved.*

Understanding of alcoholism as an illness began in this country when Dr. Benjamin Rush, a signer of the Declaration of Independence and physician general to the Colonial Army during the Revolution, published *An Inquiry Into the Effects of Ardent Spirits on the Human Body and Mind* in 1784. Since that time many prominent physicians have called for the recognition of alcoholism as an illness rather than a criminal offense.[84] Until the court decisions in 1966, however, their pleas were largely ignored.

For example, in 1947 Congress enacted what was then considered a model of progressive civil legislation to promote the rehabilitation of alcoholics in the District of Columbia.[85] Unfortunately, it did not at the same time repeal the local statutory provisions prohibiting public intoxication.[86] As a

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[84] See, *e.g., JAMA 75 Years Ago: Inebriety—Illness or Crime?* 202 J. Am. Med. Assn 23 (October 30, 1967), showing that in 1892 the British Medical Journal and the Journal of the American Medical Association concluded that:

> "... this 'National Folly' of arresting and sending to jail these poor victims of inebriety should cease. A new departure is demanded, and they should be recognized as diseased and sent to hospitals, under the care of physicians."

[85] Section 24-501 *et seq.* of the D.C. Code, 61 Stat. 744 (1947).

[86] Section 25-128 of the D.C. Code.

result, from 1947 through March of last year chronic alcoholics in the District of Columbia, as elsewhere, continued to be arrested, prosecuted and convicted for intoxication. The civil legislation calling for medical treatment and rehabilitation of alcoholics remained a dead letter.

During the intervening twenty years numerous citizen groups attempted without success to obtain implementation of the rehabilitation law.[87] The Subcommittee on Alcoholic Problems of the American Bar Association Committee for the Improvement in the Administration of Justice in the District of Columbia issued a report in 1956 recommending repeal of the law prohibiting public intoxication. In April 1957 a group of prominent public officials appointed by the D.C. Board of Commissioners issued a *Report on Prisons, Probation and Parole in the District of Columbia* in which they recommended immediate and full implementation of the 1947 Act. The Council on Rehabilitation of the area's medical societies issued a report in January 1960 which ranked resources for the treatment of alcoholics second among the four problems of greatest concern. Later that year the Washington D.C. Area Council on Alcoholism invited community leaders to a workshop which recommended that public intoxication be eliminated as a criminal offense. A D.C. Department of Public Health study issued in 1962 found that the need for adequate alcoholism treatment was mentioned in five of seven reports made between 1946 and 1961.

By 1964 it had become obvious that these reports and recommendations had been futile. Litigation was then instituted which culminated in the *Easter* decision. Yet even while the *Easter* case was in the courts, no official efforts were

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[87]For a detailed and documented review of this history see "A History of the Problems of Drunkenness and Alcoholism in the District of Columbia," in "Alcoholism," *Hearings before Subcommittee No. 3 of the Committee on the District of Columbia, House of Representatives*, 90th Cong., 1st Sess., on H.R. 6143, at 40-59 (1967); *D.C. Crime Commission Report* 474-503.

made to improve treatment for alcoholics in the District of Columbia.

The *Easter* decision was handed down on March 31, 1966. The judges of the Court of General Sessions soon concluded that they were obligated to raise, *sua sponte*, the defense of alcoholism for virtually every unrepresented indigent charged with drunkenness,[88] and almost all were acquitted and referred for treatment. There have been greater improvements in medical services for alcoholics in the District of Columbia in the succeeding 20 months than in the previous 100 years.

The D.C. Crime Commission, recognizing the challenge of the *Easter* decision, made broad recommendations for removing the entire problem of public intoxication from the criminal system and transferring it to public health agencies.[89] Bills introduced in Congress to implement those recommendations[90] have already been the subject of hearings in the House.[91] While adequate medical treatment for alcoholics is not yet available in the District of Columbia, it is on the way. All of these changes are the direct result of the *Easter* decision.

The reports of the U.S. Crime Commission, the D.C. Crime Commission, and the Cooperative Commission on the Study of Alcoholism — all of which recommend repeal of public drunkenness statutes[92] — are indispensible blue-

[88] *District of Columbia v. Walters*, D.C. Ct. Gen. Sess. Crim. No. DC-1850-66 (August 16, 1966), reprinted in 112 Cong. Rec. 22716, (September 22, 1966) (daily ed.); *D.C. Crime Commission Report* 979 n.71.

[89] *D.C. Crime Commission Report* 474-503.

[90] H.R. 6143, Title VII of H.R. 6326, S. 1740, and S. 1515 90th Cong., 1st Sess. (1967).

[91] "Alcoholism," *Hearings before Subcommittee No. 3 of the Committee of the District of Columbia, House of Representatives*, 90th Cong., 1st Sess., on H.R. 6143 (1967).

[92] *U.S. Crime Commission Report* 235-236; *D.C. Crime Commission Report* 496-497, 502; *Cooperative Commission Report* 111.

prints for the future. But if Appellant's conviction is not reversed, these blueprints will never be used. They will remain on the shelves with the many hopeful reports and recommendations issued in the District of Columbia between 1947 and 1966.

Each of these three recent reports explicitly recognized the central importance of the courts in stimulating reform in the handling of drunkenness and alcoholism. The *U.S. Crime Commission Report* at 236 stated the *Easter* and *Driver* decisions underlined "the importance of developing an alternative to treating drunkenness within the criminal system." The *D.C. Crime Commission Report* at 474-501 in effect chronicles the beneficial results of the *Easter* decision. The *Cooperative Commission Report* at 61 and 73 states that the *Easter* and *Driver* decisions "will perhaps force a re-evaluation" of handling intoxication and alcoholism as criminal,[93] and predicted:

> "If these decisions become applicable throughout the United States there are likely to be major changes in the medical care provided to those arrested for public drunkenness."

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[93] See, *e.g.*, N.Y. State Bar Assn, *Report of the Committee on Public Health* 2, 4 (December 31, 1966), which calls for "prompt legislative action in New York to forestall a similar decision in this jurisdiction holding our present methods of handling the alcoholic under arrest unconstitutional under the rule laid down in *Driver* and *Easter:*

> "The *Driver* and *Easter* decisions are in line with the moral precept that alcoholics, like the insane and the leper, should no longer be treated as criminals. The decisions are praiseworthy for the following reasons: (1) They will force the creation of non-penal facilities for the detoxification, treatment, and lodging of chronic alcoholics. (2) They will help remove the moral stigma from alcoholism by recognizing it as an illness. (3) They will prevent the unequal application of the law as between the poor and the rich since, in practice, public intoxication laws are generally invoked only against homeless and indigent alcoholics."

The court decisions have already resulted in the St. Louis Detoxification Center, the only new innovation in the handling of public inebriates in 100 years. See U.S. Crime Commission, *Task Force Report: Drunkenness* App. C at 50 (1967).

Conversely, any prospect of such changes would be eliminated if Appellant's conviction were not reversed.

The record in this case contains insufficient information to permit delineation of the proper bounds of civil commitment for treatment of alcoholics, and disposition of Appellant's appeal does not require the Court to reach or resolve this issue. The U.S. and the D.C. Crime Commissions both concluded that voluntary treatment is effective and that involuntary commitment is unnecessary and, if an alcoholic does not endanger the safety of others, perhaps unconstitutional.[94] Any questions that may arise in the future should be resolved when presented in the context of a specific case.

Reversal of the lower Court's decision will, of course, produce short-term dislocations. These would occur, however, whenever society decides to begin treating alcoholism as an illness rather than as a crime. Experience demonstrates that such crises can be overcome, and that temporary inconvenience is but a small price to pay for the long-term benefits at stake.

B. *Reversal of Appellant's Conviction Will Improve Law Enforcement and Administration of Justice.*

The U.S. and D.C. Crime Commissions have pointed out that the States and localities are expending a grossly excessive amount of law enforcement resources in dealing with intoxication and alcoholism – problems that should be the responsibility of public health agencies. Some 30 percent of all arrests and an even larger percentage of commitments to penal institutions are for nothing more than drunkenness.[95]

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[94] *U.S. Crime Commission Report* 236; *D.C. Crime Commission Report* 499. See also *Cooperative Commission Report 112.*

[95] *U.S. Crime Commission Report* 233-234; *D.C. Crime Commission Report* 474-475.

The strain upon the judicial system is equally great. In order to process derelict inebriates through the courts as rapidly as possible, the U.S. and D.C. Crime Commissions found, the ordinary safeguards of "due process of law" are largely ignored.[96]

Reversal of the lower court's decision would produce two direct benefits to law enforcement and administration of justice. It would free the police to concentrate upon protection of the public from serious crime, at a time of growing public concern about a mounting crime rate. Reversal would also relieve court congestion, particularly in the cities, and thus permit greater time for proper dispensation of justice. With court backlogs at an all-time high and respect for legal processes declining, this would be a welcome result.

Reversal of Appellant's conviction would not open the "floodgates of crime." The crime with which Appellant is charged – public intoxication – is a symptom of all chronic alcoholics. To establish the defense of lack of criminal responsibility to a charge of public intoxication, proof that the defendant is a chronic alcoholic suffices. Murder, rape, assault, larceny, and embezzlement, however, are *not* symptomatic of chronic alcoholism. Indeed, chronic alcoholics are typically passive and non-belligerent.[97]

The only unlawful conduct with which Appellant was charged is, of course, public intoxication. If chronic alcoholism were raised as a defense to excuse *other* conduct in

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[96] *U.S. Crime Commission Report* 234-235; *D.C. Crime Commission Report* 478-479.

[97] See, *e.g.*, Botein, *Speech to the Conference on the Handling of Offenders in the City of New York* 11-17 (January 1965); Murtagh, *The Derelicts of Skid Row*, Atlantic Monthly, March, 1962, p. 77; Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate* 42, 51-52, 138 (1958); *Report of the Committee on Prisons, Probation and Parole in the District of Columbia* 86, 99 (April 1957).

a future case, mere proof of the illness would not be sufficient to sustain the defense. The defendant would at least have to establish, first, that he was a chronic alcoholic; second, that he was intoxicated to such an extent that he was unable to control his behavior; and third, that his behavior resulted solely from his intoxication.[98] His guilt or innocence would then be a question for the trier of fact.[99] If acquitted and found to be a threat to the safety of others he presumably could be civilly committed for appropriate treatment.

Recognition of chronic alcoholism as a defense could undoubtedly raise difficult problems of proof and judgment. They arise now whenever the insanity defense is invoked, but they provide no reason for denying justice to Appellant.

Since the *Pike* case in 1869 alcoholism has been available as a defense to all crimes in the State of New Hampshire, which is not renowned as a haven for criminal alcoholics. Although some 5,000 individuals have been adjudicated chronic alcoholics in the District of Columbia since the *Easter* decision, to the knowledge of Amici none has asserted alcoholism as a defense to a serious crime.

It is not necessary in this case to determine precisely the effects of reversal upon the power of the police to handle inebriates. Certainly, no one can seriously dispute that the police have a right, if not a duty, to transport incapacitated citizens, including inebriates, to medical facilities for proper treatment and care. Disorderly conduct – whether by an intoxicated or a sober person, and whether by an alcoholic or non-alcoholic – that threatens harm to other persons

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[98] See, *e.g.*, *District of Columbia v. Phillips*, D.C. Ct. Gen. Sess. Crim. No. DC-855-67 (April 26, 1967), reprinted in 113 Cong. Rec. H5584 (May 16, 1967) (daily ed.), recognizing the applicability of *Easter* to disorderly conduct.

[99] For a more detailed discussion of the problems raised see Hutt & Merrill, *Is the Alcoholic Immune from Criminal Prosecution?*, 6 Mun. Ct. Rev. 5 (1966), reprinted in 25 Legal Aid Briefcase 70 (1966).

would, of course, warrant immediate arrest. Reversal of Appellant's conviction will therefore neither harm the alcoholic nor hinder the police in affording necessary protection to the public.

The States would remain free to regulate the distribution, purchase, and sale of intoxicating liquor within their borders. See, *e.g.*, *Edwards v. United States*, 206 F.2d 855 (10th Cir. 1953); *Hayes v. United States*, 112 F.2d 417 (10th Cir. 1940). The validity of legislation prohibiting the sale of alcoholic beverages to intoxicated persons would not be impaired. In short, the permissible range of State legislation for these valid purposes would remain unchanged.

The single objective of this case is to end criminal punishment of chronic alcoholics who are found intoxicated in public. Reversal of the lower court's decision will merely transfer this public health problem from the jails to more appropriate institutions.

CONCLUSION

For the reasons stated, Amici Curiae urge that the judgment of the court below be reversed.

Respectfully submitted,

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November 24, 1967

> * * * However, alcoholism must be regarded as within the purview of the medical practice. The Council on Mental Health, its Committee on Alcoholism, and the profession in general recognizes this syndrome of alcoholism as illness which justifiably should have the attention of physicians."

Recommendation for the Admission of Alcoholics to General Hospitals – Reaffirmation of the 1956 Statement, Report G of the Council on Medical Service to the AMA House of Delegates, adopted in November 1966.

> "[A]lcoholism is a chronic illness and. . . multiple hospital admissions under medical supervision may be essential to arresting the progress of the disease."

Concerning Responsibility of Psychiatrists and Other Physicians for Alcohol Problems, a position statement authorized by the Council of the American Psychiatric Association (February 1965), 122 Am. J. Psych. 454, 455 (October 1965):

> "It is urgent and imperative that psychiatrists and other physicians prepare themselves for their proper role in attacking alcohol problems on a national scale that the medical contribution may become far more telling than it has been in the past."

American Hospital Association, *Statement on Admission of Alcoholic Patients to the General Hospital,* 31 J. Am. Hosp. Assn 106 (December 1, 1957):

> "Alcoholism is a serious health problem. It falls within the scope of medical practice and it is often a medical emergency."

World Health Organization Expert Committee on Mental Health, *Report on the First Session of the Alcoholism Subcommittee*, Tech. Rep. Ser. No. 42, at 4 (September 1951):

> "The first point that the subcommittee wishes to emphasize in its report is the importance of alcoholism as a disease and a social problem. It appears to the members that this problem is one to.

> the prevention and treatment of which public-health services could make extensive contributions. They feel, however, that at present in many countries the public-health authorities have been slow to recognize the extent and seriousness of the problem involved and the extent to which health workers could contribute to its prevention and treatment."

National Institute of Mental Health, United States Department of Health, Education, and Welfare, *Alcoholism*, Public Health Service Pub. No. 730, at 9 (rev. 1963):

> "Until recently, alcoholics were generally considered perverse, weak willed, and deserving of punishment rather than help. Only within the past two decades has alcoholism come to be accepted as a medical problem."

National Institute of Mental Health, United States Department of Health, Education, and Welfare, *Alcohol and Alcoholism*, Public Health Service Pub. No. 1640, at 6-7 (1967):

> "In 1956, in an unprecedented action by a major group in organized medicine, the American Medical Association decided by a formal vote of its House of Delegates that 'alcoholism must be regarded as within the purview of medical practice.' This move, later supported by other medical and hospital groups, has been credited with dramatically altering the position of the alcoholic. Because of it, treatment has been sought by many alcoholics who otherwise would have remained hidden, as untreatable victims of an irresponsible craving."

A representative collection of additional authorities which document the recognition of alcoholism as a serious medical illness may be found in Jellinek, *The Disease Concept of Alcoholism* (1960).

APPENDIX B

Summary of the Texas Commission on Alcoholism's *Law Enforcement Handbook on Alcohol Problems*

The Texas Commission on Alcoholism has prepared a *Law Enforcement Handbook on Alcohol Problems* dealing with both the criminal and the civil provisions of the State law relating to intoxication and alcoholism. In a letter endorsing this *Handbook* the Director of the Texas Department of Public Safety notes that:

> "Police officers, by virtue of their oath of office, are obligated to protect the lives and property of the citizenry employing them. This obligation extends to all citizens including the inebriated or alcoholic law violator." P. 4.

In a similar letter the Chief of Police in Austin points out that the police officer who has a "genuinely understanding attitude towards the alcoholic" and who can "direct an alcoholic to a source of information and help" will be of "invaluable help to his community" by "helping to preserve life, health and happiness – as well as law and order." P. 5.

This official *Handbook* of the State of Texas recognizes that alcoholism is an illness:

> "*Alcoholism is an illness.* There is a progression of recognizable symptoms which lead the individual alcoholic from the relatively simple first phase of alcoholism to the complex chronic phase. Alcoholism results in the victim drinking repeatedly to drunkenness – despite the fact that it injures him physically and mentally, endangers his earning capacity, and affects his social and family life.
>
> "It can develop quickly within a few months or slowly through continuous excessive drinking over a period of many years. Mistakenly, the alcoholic is generally considered to be a weak-willed person because he cannot stop drinking. But he is a sick

person, suffering from an overwhelming *compulsion* to drink alcohol, and once started he is *unable* to stop.

"In time he develops a *chronic addiction* to alcohol.

"The cause of the disease is not yet known, but it seems to be a combination of many physical and mental factors. It develops when a person finds that alcohol relieves tension, and continues until the drinker finds he cannot cope with life without the aid of alcohol.

"The most obvious type of alcoholic is the drunken vagrant – the most *obvious* but *not* the most *common*." P. 13.

The *Handbook* describes the stages of alcoholism and suggests clues for the detection of alcoholics. It states that specialized medical treatment for alcoholism is available in six State hospitals in Texas, one of which is the Austin State Hospital.

The *Handbook* recommends that police officers arrest a drunk only if he seems "potentially dangerous." P. 23. It offers the following advice for helping the alcoholic:

"Alcoholics are sick people. They need help – and as a police officer you will often be in the best position to give that help. Your primary concern should be to direct the alcoholic to the local *Council on Alcoholism* if there is one in your community, or to direct him to specialized medical treatment, or other treatment and rehabilitation resources in your community.

* * *

"Until now the alcoholic has been ashamed because he cannot control his drinking. The goal now is to make him ashamed if he fails to *seek help*. If you can help him believe he has an illness, the chances are much brighter that he will seek treatment for it. Thousands of cases have proved this." Pp. 25, 26.

In its summary the *Handbook* points out that "to carry out the functions of his office" the police officer "should make every effort to distinguish between the chronic alcoholic and the person who occasionally has too much to drink." P. 27.

APPENDIX C

Summary of the Record Evidence
Driver v. Hinnant
356 F.2d 761 (4th Cir. 1966)[1]

On December 9, 1963, Joe B. Driver was released from jail after serving a sentence for public intoxication.[2] The next day he was again arrested for public intoxication and was convicted in the Durham Recorder's Court. He noted an appeal to the Durham County Superior Court and was released on December 10. Before his appeal could be heard he was arrested three more times for public intoxication, on December 11, 18, and 19. Each of these arrests likewise resulted in convictions, from which he appealed, and sentences of 90 days for each conviction. (S. Tr. 2, 4, 6.)[3]

On January 27 and 28, 1964, a trial *de novo* was held before the Durham County Superior Court on Driver's appeals of his convictions for intoxication on December 18

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[1] This summary is excerpted from the Brief submitted by American Civil Liberties Union, National Capital Area Civil Liberties Union, and Washington D.C. Area Council on Alcoholism as Amici Curiae to the United States Court of Appeals for the Fourth Circuit in this case.

[2] Most of Driver's arrests occurred in Durham, North Carolina. Section 14-335(12) of the North Carolina General Statutes prohibits public intoxication in Durham County, and authorizes the imposition of graduated sentences for successive convictions for public intoxication within the preceding twelve months: $50 or 30 days for the first offense, $100 or 60 days for the second, and up to two years for the third, the maximum sentence for a misdemeanor under North Carolina law. Public intoxication, without any form of disorderly conduct, is sufficient to violate this provision. A separate provision, Section 14-334 of the North Carolina General Statutes, makes it unlawful for "any person to be drunk and disorderly in any public place."

[3] "S. Tr." refers to the Transcript of the State trial held before the Durham County Superior Court on January 27 and 28, 1964.

and 19. (S. Tr. 6.) Driver admitted that he had been drunk at the times and places alleged but testified that he is a chronic alcoholic who should be permitted to seek treatment rather than be sentenced to jail. (S. Tr. 2-6, 10-12.)

The arresting officer agreed that Driver was "probably an alcoholic." Driver testified that he considered himself an alcoholic. The County Court commented from the bench that "I agree with you thoroughly that you are an alcoholic if ever I saw one." (S. Tr. 8, 10, 13.) Driver testified that he had spent about two-thirds of the previous 35 years in jail for public intoxication. (S. Tr. 10.) His Durham County arrest record showed 203 arrests for public intoxication and other minor offenses related to his drinking. (S. Tr. 12.) Driver testified:

> "That was while I was drinking. I have never been in jail in my life but what it won't the cause of it." (S. Tr. 12.)
>
> * * *
>
> "But I was a'drinking in every one of them – sole purpose." (S. Tr. 13.)

The State offered no evidence that Driver was not a chronic alcoholic.

The trial court nevertheless found Driver guilty as charged and sentenced him "to be imprisoned in the common jail of Durham County for a period of two years to be assigned to do labor as provided by law" on each of the two charges, the sentences to run concurrently. (S. Tr. 14.)

Driver appealed this decision to the North Carolina Supreme Court, which affirmed both his convictions and the sentences. *State v. Driver*, 262 N.C. 92, 136 S.E.2d 208 (1964).

On November 30, 1964, Driver's counsel filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, claiming solely that his convictions contravened the Eighth and Fourteenth amendments to the United States Constitution.

A hearing was held on February 5, 1965 before Chief Judge Butler to determine whether Driver was a chronic alcoholic.

Before the District Court an affidavit of Thomas T. Jones, M.D., was introduced into evidence. Dr. Jones affirmed that "It is my opinion Mr. Driver is alcoholic, and has suffered from chronic alcoholism for many years." He stated that Driver had been a patient, and characterized his illness as "chronic, compulsive, repeated, excessive use of alcoholic beverages." When Driver was asked whether he had "ever had any success in staying away from the bottle," he replied "No." (F. Tr. 19.)[4]

Driver's 17-page FBI arrest record, which contains the following yearly entries, indicates the severity of his disease:

1935	2	1945	7	1955	19
1936	5	1946	3	1956	14
1937	3	1947	1	1957	10
1938	6	1948	3	1958	7
1939	1	1949	0	1959	5
1940	5	1950	2	1960	5
1941	10	1951	12	1961	6
1942	12	1952	20	1962	0
1943	2	1953	11	1963	8
1944	15	1954	10	1964	6
				Total:	210

(The FBI record may understate the magnitude of Driver's problem, for his Durham County record shows some 203 arrests while the FBI records only 149 arrest entries for Durham County.) Driver again testified that "all" of the time spent in jail was attributable to his use of alcohol. (F. Tr. 19.) The State's Attorney was given an opportunity to submit interrogatories to Dr. Jones or to present counteraffidavits but again declined to present any evidence to show that Driver was not a chronic alcoholic.

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[4] "F. Tr." refers to the Transcript of the hearing held before Chief Judge Butler on February 5, 1965.

Driver's need for treatment was substantiated by virtually every piece of evidence in the record. Dr. Jones' affidavit stated that Driver:

> "is a sick man in need of treatment; he is in need of rehabilitation efforts consistent with his limited potential and performance reserves; and/or domiciliary care with supervision, guardianship and protection, rather than punishment."

A letter to Judge Butler from the Director of the North Carolina Prison Department, underscored this need:

> "I agree completely with Dr. Thomas F. Jones that this man needs treatment rather than punishment. For the most part men such as Driver are guilty of nothing other than being drunk in public. . . succumbing publicly to the disease of alcoholism . . . . I feel this [treatment] would help tremendously in breaking the cycle of revolving-door drunks who continue to return to prison."

The Director quite candidly admitted that the North Carolina Jails offered no genuine treatment for Driver's chronic alcoholism.

The result of this lack of treatment facilities was apparent in Driver's testimony and arrest record. He testified that he needed help but had never received any, and that his illness had progressed to the stage where he was incapable of overcoming it by himself:

> "I want to do something about it but it don't look like I can." (S. Tr. 10.)
>
> * * *
>
> "No, I have got a bad record for drinking. I know that, and it don't look like – I haven't been able to do anything for it. . . . I would like to get some help." (S. Tr. 11.)

Judge Butler found that Driver was a "chronic alcoholic" in that he "chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control

with respect to the use of such beverages," and he took judicial notice of the fact that a chronic alcoholic "is a sick person in need of proper medical, institutional, and rehabilitative treatment." *Driver v. Hinnant*, 243 F. Supp. 95, 97 n. 6 (E.D.N.C. 1965). But he denied the petition, holding as a matter of law that it is not cruel or unusual punishment to imprison a chronic alcoholic for being intoxicated in public.

APPENDIX D

Summary of the Record Evidence
Easter v. District of Columbia
361 F.2d 50, (D.C. Cir. 1966)
(*en banc*)[1]

DeWitt Easter was arrested on September 23, 1964 and charged with the crime of being intoxicated in public, a violation of section 25-128 of the D.C. Code. The following day he appeared in the District of Columbia Court of General Sessions, Criminal Division, and pleaded not guilty. Trial began immediately.

As its first and only witness the Government called the police officer who had arrested Easter. He testified simply that Easter was intoxicated when arrested. (Tr. 3-4.) The Government then rested its case. This testimony was not contradicted, and Easter did not deny that he was intoxicated in public as charged.

When trial resumed on September 29, uncontradicted evidence was presented that Easter suffered from the sickness of chronic alcoholism and that this sickness was the cause of his public intoxication. He contended that his sickness afforded a complete defense to the charge of public intoxication.

During the trial and at its conclusion the trial court's attention was drawn to section 24-501 *et seq.* of the D.C. Code, 61 Stat. 744 (1947). These provisions permit a judge to institute civil proceedings to commit a "chronic alcoholic" to the D.C. Alcoholic Rehabilitation Clinic for treatment and rehabilitation, once the District Commissioners have certified to the Court of General Sessions that "proper and adequate treatment facilities and personnel have been provided." The trial court ruled that it would exercise its discretion not to institute civil commitment proceedings and observed that,

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[1] This summary is excerpted from the Brief for Appellant in the United States Court of Appeals for the District of Columbia Circuit.

in any event, the requisite certification had not been shown to exist.[2]

As might be expected from Easter's lack of education, history of constant drinking to excess, and present debilitated condition, the record contains minor factual discrepancies and inconsistencies. But the story of his gradual deterioration from a useful working citizen to a homeless skid row derelict constantly arrested for public intoxication because of his chronic alcoholism remains crystal clear.

Easter, 60 years old and a plasterer by trade, left school after the eighth grade to learn his trade from his father. Until 1960 he was able to hold steady employment, earning as much as $175 per week. (Tr. 10-11, 19, 42, 95; D. Ex. 7.) He apparently began drinking in about 1925, and at first drank only sporadically. By the 1930's he was consuming alcoholic beverages on a regular basis, gradually increasing his intake in an attempt to cope with family responsibilities and work stress. He was first arrested for public intoxication in 1937. (Tr. 11-13, 16, 41-42, 91; D. Ex. 1, 7.)

At that time Easter was still able to control his drinking "to a certain extent":

> "As I started drinking on a weekend I would probably last for maybe a couple of more days, and if I drank one day and some part of one night during the week I went to work the next day, but if I drank two days in succession I had to take a couple of more days to get straightened out." (Tr. 12)

But Easter progressively lost control over his use of alcoholic beverages and experienced a corresponding deterioration in

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[2] On February 14, 1950, the President of the District of Columbia Board of Commissioners certified to the Chief Judge of the Municipal Court that an outpatient Alcoholic Rehabilitation Clinic had been established, but stated that there are "no facilities for the confinement and hospitalization of chronic alcoholics committed to it by the Municipal Court for treatment."

virtually every aspect of his life. (Tr. 41-42, 91, 94; D. Ex. 7.) By 1960 he was unable to hold down a job. He now depends solely upon disability payments for support. (Tr. 19, 42, 95; D. Ex. 7.) His relationship with his wife and two children deteriorated, culminating in a separation from his wife in 1957 and a divorce in 1959. Relatives would not associate with him while he was intoxicated. (Tr. 42, 94; D. Ex. 7.)

Easter's arrests became progressively more frequent. In 1963 he was arrested 12 times for intoxication. His police record shows approximately 70 arrests since 1937, all for intoxication or other minor violations directly attributable to his drinking. (Tr. 17-19, 39, 41-42, 94; D. Ex. 1, 7.) At times he has consumed two or three fifths of whisky a day. His "usual" consumption may be two pints or as much as it takes to pass out. On innumerable occasions he has been intoxicated but avoided arrest. (Tr. 25; 36-37, 41-42, 60-61, 91-94, 104-105; D. Ex. 3, 7.)

Easter's physical condition has deteriorated badly as a result of his drinking and consequent lack of proper diet. He suffers from blackouts and impending delirium tremens. On at least two occasions he sought medical help when he had become almost too weak to walk. He now suffers from several physical infirmities commonly associated with chronic alcoholism. (Tr. 19, 27, 43, 50-51, 94-96; D. Ex. 3, 7.)

His family life destroyed, Easter has no regular place to live and therefore stays wherever he can. His police arrest record shows 23 different addresses in the past eight years, and on three occasions he apparently could not furnish even a temporary address. (Tr. 10, 38, 42, 94; D. Ex. 1, 7.)

With help, Easter has occasionally refrained from drinking for short periods. Periodic hospitalization appears to have "slacked me up for a while," but he always returned to drinking within a short time. Indeed, in June 1962 he turned to the Alcoholic Rehabilitation Clinic for help because "he thought he could stop drinking on his own" but

found he could not. He once participated in the Alcoholics Anonymous program sponsored by the Court of General Sessions, but after several months left the program and has not used it again. (Tr. 19-20, 24-26, 31, 36; D. Ex. 7.)

All of the doctors and public health nurses who have examined or interviewed Easter during the past ten years have concluded that he is a chronic alcoholic. The record contains no evidence that can properly be interpreted as refuting this diagnosis. (Tr. 45, 56-57, 102; D. Ex. 3-7.)

Two Washington physicians who specialize in the treatment of chronic alcoholics, Dr. Earl H. Mitchell and Dr. Anthony Zappala, independently conducted a physical examination of Easter, questioned him about his past history, and reviewed pertinent medical and other records. Dr. Mitchell, an internist, testified that Easter is suffering from malnutrition, anemia, peripheral neuritis, and enlargement of the liver, all of these conditions consistent with his past history of excessive use of alcohol. Indeed, Dr. Mitchell stated that peripheral neuritis is uncommon except in cases of chronic alcoholism. From Easter's history and his present physical condition, Dr. Mitchell concluded that he has lost self control over the use of alcohol and is a chronic alcoholic. In cross-examination, he testified that he had no reservations whatever about this opinion and diagnosis. (Tr. 41-43, 45-46, 49-51, 56-57, 63-64, 68.)

Dr. Zappala, a psychiatrist, testified that by the early 1940's Easter had "lost control over his ability to handle alcohol, and at that point one can say that alcoholism set in." He described the typical pattern of physical, social, and psychological deterioration that accompanies chronic alcoholism, and testified that Easter's history and condition are characteristic. He stated that fractures, infections, and head injuries are the most common physical complications of chronic alcoholism and pointed out that Easter suffers from all three. (Tr. 91-96, 98-100, 103-105.)

On occasion Easter has gone to D.C. General Hospital in a state of acute intoxication "because I was in bad shape and

needed hospitalization," to get help for his "alcoholic condition." (Tr. 25-26, 31-32, 36.) His hospital records confirm the seriousness of his chronic alcoholism. For example:

a. Easter was admitted on August 18, 1957, and discharged two days later with a final diagnosis by the attending physician of "alcoholism." The admitting physician's notes state that Easter was a "chronic alcoholic starting D.T.'s yesterday." The physician who conducted the physical examination described him as a "chronic alcoholic. . . after 2 week binge." (D. Ex. 5.)

b. Easter was admitted on January 15, 1958. The physician's diagnosis was "chronic alcoholism and minimal acute alcoholism." (D. Ex. 6.)

c. Easter was admitted on May 7, 1962. The admitting physician noted that the patient "admits to 24 day alcoholic binge and at present is too weak to walk – has no place to go. . . undernourished. . . . dehydrated," and designated the problem as "acute and chronic alcoholism." Although the psychiatric ward concluded that admission was not warranted, the admitting physician decided that Easter "must be admitted. . . as a social emergency." He was accordingly admitted to the medical ward "to assay extent of damage incurred over 30 day period of heavy drinking." The physician who prepared the clinical record stated that Easter was a "chronic alcoholic" who, about 30 days before admission, "began drinking heavily – whisky 2-3 fifths a day." He was described as "poorly developed, poorly nourished, unkempt. . . appearing chronically ill," with "impending DT's and mild malnutrition secondary to chronic alcoholism and poor dietary habits." (D. Ex. 3.)

Easter occasionally voluntarily went to the D.C. Alcoholic Rehabilitation Clinic to get help for his "alcoholic condition." (Tr. 25-26, 30-32, 36.) His records show that he visited the Clinic twelve times, and that he used the Clinic "mainly for emergency medication."

a. Easter first visited the Clinic on October 6, 1953, after "consuming large quantities of whisky within the past

10 days," seeking "something to straighten me out." He was given medication and advised to "rest at home." (D. Ex. 7.)

b. He next visited the Clinic on March 17, 1961, for "emergency services," and again received medication. The Clinic record describes him as "chronically ill and debilitated." It further states:

> "He started drinking in 1927, but very heavy in the 30's with the lifting of prohibition. He was able to work every day for many years. Has not worked now for 1 year.
>
> "Drank 3 pints of wine last week, vomited for 2 or 3 days. He has recent cuts on his face 'I fell, so weak, you know.' "

Easter asked for help and was told to return in four days – an appointment he failed to keep. His problem was described by the Clinic's Chief Psychiatric Social Worker as "alcoholism (addiction)." (D. Ex. 7.)

c. Easter returned again to the Clinic "for help with drinking problem" on June 6, 1962, and was given medication. The report states that he was then "drinking nearly 1/5 whisky daily – plus beer," and "has been on binge for over 2 months daily." His condition was again described as "alcoholism (addiction)." (D. Ex. 7.)

Dr. Zappala described chronic alcoholism as an "illness" that is "symptomatic of underlying and very complex other factors," including "physical, psychological, sociological" factors but not limited to any one. He explained that a chronic alcoholic usually first begins to drink socially and then increases his consumption to help cope with the responsibilities and stresses of life, finally losing control. Dr. Zappala used "loss of self-control" to mean the same as "no longer able to moderate or stop" or "unable to make the decision" or "behavior is out of hand." (Tr. 91, 101.) Dr. Mitchell described chronic alcoholism as a "disease," and admitted that it is not known definitely whether it is a physical or mental condition. He considers "alcoholism"

to be synonymous with "alcoholic addiction," and "loss of self-control" to be synonymous with "loss of the will." (Tr. 46, 70-71.)

Dr. Mitchell also testified that the prevailing medical view is that a chronic alcoholic can never again safely resume social or temperate drinking, and that his only recourse is to stop drinking completely. Hence, abstention and complete sobriety is the objective of medical treatment. Complete sobriety will mean, of course, that the individual is no longer habitually intoxicated, because he is no longer drinking, but the inability to stop drinking will remain latent in him and will in all but a few rare cases cause an immediate return to the typical pattern of the chronic alcoholic if drinking is resumed. (Tr. 67, 69-72.) Dr. Zappala added that a lack of self control over the use of alcohol is rooted in, and intrinsic to, the personality of the chronic alcoholic. Although chronic alcoholism cannot be cured, he testified, it can, "with adequate treatment," be "favorably influenced" to the extent of allowing the patient to lead a normal life without drinking. (Tr. 91-92, 101.)

At the conclusion of the trial, counsel requested special findings of fact that Easter is a "chronic alcoholic" as defined in section 24-502 of the D.C. Code and that, as a chronic alcoholic, he is a sick person suffering from a disease. (Tr. 115-116). The trial judge ruled that both points were irrelevant and refused to make the requested findings of fact. (Tr. 122-123.)

The trial court also rejected Easter's legal arguments that, as a chronic alcoholic, he lacked the criminal capacity necessary to violate section 25-128, and that to convict him for publicly exhibiting the symptoms of his sickness would constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. (Tr. 118, 123.) Easter was thereupon found guilty as charged and sentenced to 90 days imprisonment, although execution of the sentence was suspended. (Tr. 121, 123.)

In the District of Columbia Court of Appeals Easter relied upon the same factual and legal arguments as he had raised in the trial court. On April 29, 1965, that court affirmed the trial court's judgment. *Easter v. District of Columbia*, 209 A.2d 625 (D.C. Ct. App. 1965).

APPENDIX E

Summary of the Record Evidence
Seattle v. Hill
Washington Supreme Court No. 39050
Argued March 28, 1967.[1]

At the time of his arrest on May 4, 1966, Wayne J. Hill was lying unconscious on a Seattle sidewalk. (St. 6.) Although unable to make his way home by himself, he was not disorderly or in any way threatening any person or property. (St. 8.) He presented no danger to anyone. Hill was charged with being "willfully and unlawfully drunk in a public place" in violation of Seattle Municipal Ordinance No. 16046, which provides in pertinent part:

> "It shall be unlawful for any person to be guilty of. . . drunkennesss. . . ."

The trial court construed this ordinance as prohibiting only drunkenness in public. (St. 91.) Hill did not dispute that he was drunk and in a public place when arrested.

At his trial *de novo* Hill admitted that he was a "chronic drunk" and lamented that he is not living "like a human being." (St. 13.) His uncontrolled drinking began about 1946, when his wife divorced him and his family life disintegrated. (St. 13-14.) His personal life and his physical condition have been deteriorating ever since. He has not worked regularly for many years. (St. 16, 37.) He was treated for tuberculosis in 1952, has lost more than 50 pounds, and now experiences "blackouts." (St. 13, 15-16, 22.)

Since 1949 Hill has been arrested 99 times for being drunk in public in the City of Seattle alone. (Ex. 1, St. 9.)

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[1] This summary is excerpted from the Brief submitted by North American Association of Alcoholism Programs, Washington D.C. Area Council on Alcoholism, and National Council on Alcoholism as Amici Curiae to the Washington Supreme Court in this case.

He has been sentenced to more than 17½ years in jail for this offense and was under suspended sentences totalling more than 5 years. He had never been arrested for an offense not related to his drinking. (Ex. 1, St. 9.)

Hill has at times interrupted his drinking, once for 18 months when he was in a Public Health Service hospital. (St. 15, 17, 18.) But he no longer is able to keep from drinking, except when deprived of alcohol while in jail. He admitted that he cannot help violating the law. (St. 24.) Hill testified that he still wants to overcome his disease and promised he would put forth a "good effort" if the opportunity to do so were provided. (St. 20.)

Dr. Edward M. Pattison, Professor of Psychiatry at the University of Washington, who examined Hill and had access to his medical records, testified that Hill is a classic example of a victim of chronic addictive alcoholism. (St. 37-38, 58.)

> "Mr. Hill presents the typical symptoms and manifestations of the disease of alcoholism as has been defined by the World Health Organization, the American Medical Association, the National Council of Alcoholism and the American Psychiatric Association among other bodies. It is also a formal diagnosis in the classification scheme of the American Medical Association and in the diagnostic classification scheme of the American Psychiatric Association." (St. 60-61.)

His physical deterioration, the breakdown of his family and social relationships, and his inability to retain employment, according to Dr. Pattison, are typical of chronic addictive alcoholics. (St. 61-63.)

Dr. Pattison stated that Hill is no longer able to refrain from drinking or to control his consumption of alcohol once he has begun drinking. (St. 61, 63.) In his opinion, Hill is unable to lead a life different from that he has led for the past 17 years. (St. 38.) His previous sporadic periods of abstinence, Dr. Pattison testified, are characteris-

tic of chronic alcoholics whose lives are periodically interrupted by enforced detention. (St. 38, 63.)

In short, Dr. Pattison found that Hill is addicted to and dependent upon alcohol, that he is no longer able to control his drinking, and that his drinking and his appearances while drunk in public are symptoms of his disease. (St. 61-62, 73.) Dr. Pattison testified further that Hill requires treatment rather than punishment (St. 74.), which has not deterred and will not deter the drinking. (St. 65-66, 69-70.)

Dr. John H. Lindberg, President of the Washington State Society of Internal Medicine, testified that Hill's medical history left no doubt that he is a chronic alcoholic. (St. 84.) He described Hill's inevitable physical decline if his disease is not treated, including cirrhosis of the liver, brain cell deterioration – which has already begun – and nerve destruction. (St. 85-86.) If his disease continues untreated, it will eventually result in his death. (St. 87.) Dr. Lindberg made clear that Hill can be treated. (St. 86.) In his judgment, however, the chances that Hill could ever overcome his disease without assistance are less than 1 in 20. (St. 87.)

The Honorable Charles Z. Smith, Judge of the Municipal Court of the City of Seattle, described the incidence of chronic alcoholism in the Seattle area and the deplorable lack of treatment facilities. (St. 39-54.) He pointed out that in Seattle no public funds are being spent on alternatives to imprisonment of chronic alcoholics. (St. 47, 53.) The few "informal" voluntary agencies are clearly not sufficient to cope with the problem. (St. 49.) No Seattle hospital will admit patients that are diagnosed primarily as alcoholics. (St. 50.) At the same time, Judge Smith testified, Seattle spends $3,497,579 annually to arrest, prosecute, convict, and jail chronic alcoholics who are found drunk in public, easily enough to fund a modern treatment and rehabilitative program. (St. 54.)

The trial court construed Ordinance No. 16046 as prohibiting only drunkenness in public. The court admitted that Hill is a chronic alcoholic. It ruled, however, that alcoholism is not a defense to a criminal charge.

APPENDIX F

Summary of the Record Evidence
People v. Hoy
Michigan Supreme Court No. 51563
Argued November 7, 1967.[1]

When he was arrested on July 31, 1964, Frederick Hoy was standing in an intersection in the City of Lansing. (Tr. 27.) He was attempting to hitchhike home from the Casanova Bar after having tried unsuccessfully to call a taxicab. (Tr. 69.) The record contains no evidence that he was disrupting traffic or annoying passersby, or in any way threatening any other person or property. Hoy was charged with violating section 28.364 of the Michigan Annotated Statutes which provides:

> "[A]ny person who shall be drunk or intoxicated. . . in any public place. . . shall be deemed a disorderly person."

Hoy's plea of guilty was accepted on August 9, and in October he was sentenced to the State Prison at Jackson, Michigan "for not less than one and one-half nor more than two years."

Some time after, Hoy filed with the Circuit Court for Ingham County a petition to vacate his sentence and withdraw his plea of guilty, and for a new trial. A hearing was held on January 22, 1965, at which he presented testimony to establish his defense.

Hoy's first witness was Richard C. Bates, a specialist in internal medicine and Managing Director of the Alcoholism Therapy Unit at the Edward W. Sparrow Hospital. Dr. Bates had examined Hoy, and studied his medical records and ar-

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[1] This summary is excerpted from the Brief submitted by North American Association of Alcoholism Programs, Washington D.C. Area Council on Alcoholism, National Council on Alcoholism, American Civil Liberties Union, and American Civil Liberties Union of Michigan as Amici Curiae to the Michigan Supreme Court in this case.

rest record. (Tr. 4.) He testified that Hoy had begun drinking at the age of 12 and had first experienced blackouts as a result of his drinking at the age of 16. (Tr. 5.) According to Dr. Bates, Hoy has blacked out from drinking on at least 100 occasions and has been arrested more than 20 times because of his drinking. (Tr. 6.) Dr. Bates reported that Hoy's wife had divorced him, taking their only child, because of his inability to stop drinking. (Tr. 6-7.) During only 6 months of the last several years of his life has he been able to refrain from drinking, *viz.*, during two three-month periods in 1950 and 1961. (Tr. 7.)

Dr. Bates testified that, in his opinion, Hoy is a chronic alcoholic. (Tr. 9.) He defined chronic alcoholism as a disease that impairs its victim's ability to function in society, and stated that almost all alcoholics are unable to control their drinking. (Tr. 9-11.) He described Hoy as a severe victim of the disease, who cannot stop drinking without treatment. (Tr. 11.) In Dr. Bates' judgment, repeated conviction and imprisonment are of little help in effecting treatment. (Tr. 17-18.)

Hoy's second principal witness was Dr. Donald Damstra, a physician at Brighton Hospital, which is devoted entirely to the treatment of chronic alcoholics. Dr. Damstra has had wide experience in dealing with chronic alcoholics. (Tr. 31-32.) He agreed with Dr. Bates' testimony that Hoy is unquestionably a chronic alcoholic, that he has been a chronic alcoholic since the age of 16, and that he was suffering from chronic alcoholism on July 31, 1964. (Tr. 33-34.) He stated that alcoholics characteristically have no control over their drinking and that their intoxication is generally symptomatic of their disease. (Tr. 34.)

Dr. Damstra also agreed that imprisonment is not a recognized treatment for chronic alcoholics. (Tr. 35.) He was pessimistic but not without hope that Defendant would respond to treatment under the proper circumstances. (Tr. 44-45.)

Hoy's own testimony confirmed the accounts of Dr. Bates and Dr. Damstra. He acknowledged that he had begun drinking at the age of 11 or 12, that he had been able to refrain from drinking only for two short periods and that he had always gone back to drinking. (Tr. 47-48.) Hoy testified that he had lost several jobs as a result of his drinking and that he had not worked regularly for 3 years. (Tr. 48.) He is unable to stop drinking because he experiences the "shakes" and admitted that drinking has become the center of his life. (Tr. 50, 65-66.) Hoy also testified that he would be willing to undergo treatment no matter how long it required. (Tr. 50, 55.) Hoy conceded that he had been intoxicated when he was arrested on the evening of July 31, 1964, and that he had called a cab in order to avoid arrest. (Tr. 46, 60, 70.) He testified that he had been arrested 24 times for drunkenness. (Tr. 67.) So far as the record reveals, Hoy has never been arrested for an offense not related to his drinking.

Appellee presented no evidence at the hearing. The evidence presented by Defendant and by Dr. Bates and Dr. Damstra therefore stands uncontradicted.

On February 16, 1965 the Circuit Court denied Hoy's petition to vacate his sentence and plea and for a new trial. On July 12, 1966 the Court of Appeals affirmed the action of the Circuit Court.

APPENDIX G

Representative Community Comments on Criminal Punishment of Chronic Alcoholics for Public Intoxication

Stern, *The National Crime Commission's Report on Public Drunkenness: Where Do We Go From Here?*, North American Association of Alcoholism Programs Spec. Rep. No. 40, at 2-4, 6 (September 28, 1967). Mr. Stern was the staff member of the President's Commission on Law Enforcement and Administration of Justice who had direct responsibility for researching, preparing, and documenting the Chapter of the Commission's Report devoted to "Drunkenness Offenses."

> "The Commission recommended that drunkenness not be a criminal offense. This recommendation endorsed, by implication, the recent court decisions barring the prosecution of alcoholics on charges of drunkenness. It is noteworthy that none of more than four hundred other Commission recommendations sought to repeal any existing law.
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> "Even the most casual observation of people arrested for drunkenness reveals that most are extremely poor. Many live on skid row and are beset by a variety of complex medical and social problems. Many experience repeated cycles of arrest, brief incarcerations and release to skid row. Many so-called chronic offenders – in reality, chronic alcoholics – have histories of one hundred to two hundred arrests and have served up to twenty years or more in jail on short term sentences for nothing more than being intoxicated.
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> "After arrest, these hapless defendants are booked, placed in a barren cell – called a 'tank' – and subsequently sentenced to jail or released. Between the point of arrest and sentencing they are paraded before a magistrate, who too often uses the opportunity to entertain the courtroom audience. In court they are given few of the due process safeguards to

which the law says they are entitled. This is one paradox of the system. It is convenient to resort to the criminal system to handle poor alcoholics but too inconvenient to provide the protection which should accrue in every criminal case.

"During their stay in jail, from the point of arrest to release, they receive the most rudimentary assistance. It should be no indictment of the police and correctional authorities that proper services are not provided. The business of the criminal system is not to provide the services necessary to meet complex medical, welfare and social needs. The paddy wagons are not ambulances. The tank is not a clinic. The jailhouse guard is not a doctor, nurse or social worker.

"Moreover, the arrest process, per se, implies certain formalities designed for the handling of persons accused of committing crimes. A Commission study concluded, for example, that some of the 'police brutality' observed took place while the police were attempting to book drunkenness offenders. The fact that inebriates are in no condition to stand against a counter and answer questions is foreign to the entire criminal process.

"Further, the police are simply not sufficiently trained to cope with the needs of this population. And, regardless of their training, Commission studies revealed that many are not well-suited for the type of services they provide. The high incidence of physical abuse recorded by Commission observers involving public drunkenness defendants becomes more understandable when viewed in the light of a detailed study undertaken with Commission funds of police 'patterns of behavior.' Policemen treat inebriates with a greater degree of belligerence and prejudice than they treat non-inebriates. It was concluded that police attitudes manifest themselves in police behavior because of the great autonomous discretion the police have in dealing with inebriates.

"Proper treatment for the effects of intoxication as well as comprehensive treatment for alcoholism are unavailable between arrest and release. Nor is any attempt made to provide the social and vocational counseling so desperately needed. The offender is merely released from jail or court and expected back within a few hours or days. With the fortification of a few days of sobriety, in fact, he is more able and more willing than ever to continue his drinking pattern.

"In the clearest of terms, the Commission stressed that the use of the criminal system to arrest non-disorderly inebriates – whether or not alcoholic – is wrong. The need to remove unseemly sights from public view – the traditional 'street cleaning' function of such arrests – was not appreciated. (And I would add that as long as such unseemly sights exist, they should always remain in public view.) Nor was the Commission pleased with the distortion of the criminal process, including discriminatory arrests and the failure to provide guaranteed rights in the police station and in the courtroom.

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"In seeking the repeal of drunkenness laws, the Commission has not disputed the logic or necessity of offering emergency welfare services. The judge in drunk court who, upon sentencing the chronic offender, says: 'Sixty days, you'll freeze to death out there,' seems truly motivated by the defendant's best interests. But the need for food, shelter and medical care does not justify the continuance of the criminal system. More and better welfare services are needed. More and better medical services are needed. More and better counseling is needed, and more and better alcoholism treatment programs are needed. There is little doubt that the accessibility of the jails – virtually used to hide this problem – is largely responsible for the lack of necessary services and treatment programs. As urged by the two recent Presidential

Crime Commissions, we must abandon the view that arrest is the only alternative and focus our attention on the basic problems and the best ways of meeting these problems.

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"The Court's ruling in *Easter v. District of Columbia* will eventually be the law of the land. It is far too reasonable and just to be otherwise.

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"In the absence of an expanded effort by interested groups and individuals, however, the Report of the Commission will have little impact upon existing procedures. It hardly needs mentioning that the report will not drive fifty state legislative bodies into emergency session to repeal public drunkenness laws. Nor will it singlehandedly change existing arrest policies in the more than 4,000 cities across the country. To obtain optimum results it must be employed as persuasive authority and its findings and suggestions urged upon those able to effect change. It must be supplemented by legal challenges of existing abuses.

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"The paucity of court decisions in this area reflects merely the lack of challenges in court, seemingly caused by a general indifference to the skid row resident. It is only the absence of such legal challenges in Chicago, for example, that permits the daily arrests of non-disorderly homeless men on charges of disorderly conduct.

* * *

"Finally, we can all assist in bringing about the inevitable change by insisting that so long as the present system exists, all criminal justice personnel – including the police and judiciary – treat all citizens alike. Since this system is unable to perform without discrimination and abuse we can thus ensure its early demise.

> "Now let me emphasize this point: it may be debatable whether drunkenness is so anti-social, so immoral and so contrary to our ethics that it should be punishable by criminal laws. But it is not debatable that the system, if it continues, must act in a non-discriminatory manner and must safeguard the guaranteed rights of all offenders. Accordingly, we must insist that every person drunk in public should be arrested or none at all. We must insist that every person or none at all be given the right to a trial, the privilege against self-incrimination, the right to present evidence and to cross-examine the arresting officer. We can not have it both ways. If we use the criminal system, we must provide the protections which are so sacred in criminal cases."

Goldfarb, *Roadblocks to Progress in the Treatment of the Chronic Inebriate,* North American Association of Alcoholism Programs Spec. Rep. No. 39, at 2, 4-5 (September 28, 1967). Mr. Goldfarb was the staff member of the President's Commission on Crime in the District of Columbia who had direct responsibility for researching, preparing and documenting the Section of the Commission's Report devoted to "The Drunkenness Offender."

> "Every city has a particular set of laws which determine the procedures to be followed in handling a person who is found to be intoxicated in public. These laws authorize and direct certain people to deal with the public inebriate in certain ways. They are the framework within which the chronic inebriate lives – a framework of cynicism and inhumanity. In order to change the way society deals with the chronic inebriate, it is essential to change the applicable legal framework. A statutory structure devised for punishment is not suitable where treatment is the goal.
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> "As we began our study in Washington, we were awaiting the *Easter* decision. Although the result was widely anticipated, the government made no preparations for it and made every effort to ignore

it. The public prosecutor took the position that the *Easter* defense had to be raised by the public intoxication defendant – an approach which would have aborted *Easter's* impact. Public health authorities, beset by budgetary problems, failed to press for the implementation of *Easter*. The Commission tried to encourage reforms in the city's system of handling drunkenness offenders. On all sides, we found public officials decidedly uninterested in spearheading or even cooperating in reform.

"The situation we found in Washington is common. Public officials tend to be conservative. They resist change in orderly procedures they have come to rely upon. The risks of change are greater than its rewards. If we in Washington, with the imprimatur of the President behind us had the difficulty that we did, I can imagine the warmth with which local bureaucracies greet reformist ideas.

"The derelict alcoholic has never been the subject of serious public concern in the United States. Drunkenness has been considered a moral flaw worthy of condemnation. That aura continues to surround the alcoholic, in his own and the public's mind. Absent a sudden upsurge of will power, a drunk is destined to remain a drunk.

"The derelict alcoholic has no constituency. There is no one to press for reform in his treatment. His family is sufficiently detached from him and disgusted with him that they simply do not care.

"In sum, there has never been any significant public pressure for reform in the treatment of alcoholics. But without such pressure, reform efforts cannot help but fail.

* * *

"In my opinion, any substantial progress toward reform, in the present climate of public opinion, is decidedly unlikely. There is only one way to achieve reform. That is to utilize every available technique

to arouse public opinion and thereby place pressure on government agencies.

"The most obvious pressure technique is litigation. The issues involved in the *Easter* case, the lawfulness of civil commitment and the right to treatment can be the basis of litigation in every community. By litigation, I do not mean simply the establishment of a particular legal rule. I mean continually making certain that the particular legal rule is being properly applied. For example, a specific jurisdiction may have accepted the rule that a chronic alcoholic cannot be convicted of the criminal offense of public drunkenness. Such a ruling is not an end in itself, but a means of assuring proper treatment of the alcoholic. All too often, for what they view as eminently practical reasons, local prosecutors, courts, correctional personnel and other governmental officials are likely to thwart the thrust of the new rule. Prosecutors may continue as before. Appropriate pre-trial diagnosis may not be available. Workhouses may change their label without changing the substance of their activities. In order to assure that the alcoholic's rights are being continuously protected and expanded, every community should have an attorney who takes that responsibility. The particular status of this lawyer will depend on the size of his city and other pertinent factors. The important thing is that there be a competent attorney who devotes a part of his time to representing the interests of the derelict alcoholic community in this time of legal change."

"Opportunity For Urban Excellence," *Report of the Atlanta Commission on Crime and Juvenile Delinquency* 122-123 (February 1966).

"Focusing on alcoholism and the crime of public intoxication in Atlanta, we learn from the latest annual report of the Atlanta Police Department that over half of the arrests made for non-traffic offenses in 1965 involved public intoxication.

"According to a study by the Emory University Department of Psychiatry on the alcoholic prisoner in Atlanta, done in 1963, arrests of the alcoholic utilized 40% of the municipal court time, utilized 60% of police time, the alcoholic occupied 60% of the space in the city jail and composed 95% of the stockade inmates. To this must be added the additional financial loss to the Atlanta business community stemming from absenteeism.

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"The alcoholic remains one of the forgotten men in our community, with no governmental body, local, state, or federal taking adequate responsibility for his care and rehabilitation.

* * *

"It has become clear that neither fines nor imprisonment rehabilitates these men."

Ramon, *Radio Interview* (January 17, 1967). Mr. Frank Ramon, Chief of Police of the City of Seattle, Washington, made these comments during a documentary entitled "Cycle of Shame."

ANNOUNCER: "Do you feel that alcoholics should be jailed or should they not be jailed but treated as sick people?"

CHIEF RAMON: "Well, as a public official I have no choice. Whether alcoholism is a disease or not would not affect my official position. Drunkenness is a crime. So we must enforce the law by arresting these people. We know in the Police Department that probably right at this moment there are more than 200 men in the city jail serving sentences for drunkenness who have never posed any threat to the community in any fashion at all. The only person they've hurt is themselves. We also know that if these people were not arrested and jailed at frequent intervals they wouldn't live very long. We do know that there must be a better way to handle them and we do know that these

people are not criminals in the sense of having selected a different than normal way of living. * * *

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"The police are concerned with the protection of the community. Every police agency in the United States, every municipal one, diverts and wastes too much police time on handling persons who don't pose any threat to the community. Certainly I'd like to see a determination that these people who are living useless futile lives, and certainly it's not because they want to, that they are not treated like criminals. I believe that, some 200 years ago mentally ill persons were treated in the same fashion, and I think it is time our society grows up and recognizes that there are problems beyond an individual's control, that though his behavior may be antisocial he should not be treated as a common criminal."

"Alcholism," *Hearings Before Subcommittee No. 3 of the Committee on the District of Columbia, House of Representatives*, 90th Cong., 1st Sess., on H.R. 6143 (1967). Col. Edward Dowd, President of the Board of Police Commissioners, St. Louis, Missouri, at 17, 18.

"The process of sending persons through City Court, down to the workhouse for 30 or 60 days, or assessing a fine that was never collected, was found to be a dismal failure with a lot of people that were human beings but were treated really more like animals than people.

"We established a Detoxification Center[1] in November of 1966. . . * * *

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[1] St. Louis based its proposal for a detoxification center on the need to meet the requirements of the *Driver* and *Easter* decisions. See "St. Louis Proposal to Establish a Detoxification Center," in U.S. Crime Commission, *Task Force Report on Drunkenness App. C at 50 (1967).*

". . . we are reluctant to believe our own figures, but we are having a drop in arrests for public alcoholism of 66 percent. * * * But the fact remains we are having a lot less of a problem on the street with the public alcoholic than we were having this time last year.

Dr. David Pittman, President of North American Association of Alcoholism Programs and Director of Social Science Institute in St. Louis, Missouri, at 103, 106.

"What happened in St. Louis is that the police and not the health agencies had to take the lead in trying to do something about this particular problem.

"We constantly met with them and the police officer used to take 190 minutes to process one of these individuals because we would have to wait at City Hospital, nobody would see the individual, and so on. We reduced this to 50 minutes of time since the individual can receive treatment immediately.

"The police officer then can get back to his problem on the beat."

Harrington, *The Other America* 95 (Penguin ed. 1963).

"But even more vicious was the Police Pickup. I never understood how the exact number to be arrested was computed, but there must have been some method to this social madness. The paddy wagon would arrive on the Bowery; the police would arrest the first men they came to, at random; and that was that. At night, in the drama of dereliction and indifference called Night Court in New York, the alcoholics would be lined up. Sometimes they were still drunk. The magistrate would tell them of their legal rights; they would usually plead guilty, and they would be sentenced. Some of the older men would have been through this time and time again. It was a social ritual, having no apparent effect on anything. It furnished, I suppose, statistics to prove that the authorities were doing their duty, that they were coping with the problem.

"These alcoholics will probably be left to themselves for a long while. Though their spiritual torment is well known by most Americans, what is not understood is the grim, terrible, physically debilitating life of the alcoholic."

Editorial, *Recent Court Decisions Regarding Imprisonment of Alcoholics,* 197 J. Am. Med. Assn 582 (August 15, 1966).

"Change comes about in strange ways, but at last a change in attitude toward the alcoholic patient is being accomplished.

"For too many years the plight of alcoholic persons, especially those who inhabit skid rows and 'drunk tanks,' has provided the occasion for amusement, disdain, and disapproval. Because of seemingly insurmountable social and administrative barriers, the medical profession has not afforded alcoholics the treatment usually offered to sufferers of more clearly defined medical disorders. The jail, with the policeman, judge, and probation officer acting as unwilling accomplices, was made the dumping ground for this human 'refuse'; here little but futile ritual was exercised, and constructive action was seldom undertaken.

"Recent application of the 8th Amendment of the United States Constitution confronts us with the fact that alcoholism is an illness and must be treated as such. Our society can no longer ignore the fact that it is wrong to punish another human being for being sick, even if the sickness is alcoholism."

Smith, *The Alcoholic and the Law* 20 (May 1966). Judge Charles Z. Smith then sat on the Seattle Municipal Court and now sits on the King County Superior Court.

"Few persons seriously take issue with the conclusions of the courts in the *Driver* and *Easter* cases that the unpretending alcoholic should not be branded a criminal merely because he appears in a public place in an intoxicated condition. Most lawyers and judges will agree that it is cruel and unusual punishment in violation of the Eighth Amendment to the United States

Constitution to jail a person for public intoxication where that intoxication is the result of non-volitional drinking attendant to the disease of alcoholism."

Report of the Minneapolis Task Force on the Homeless Alcoholic 4, 6, 7 (March 1967).

"There are approximately 900 homeless alcoholics in Hennepin County. The vast majority are non-contributing, non-productive members of society. Society's present method of dealing with the problem, almost invariably incarceration, has been singularly ineffective. Almost to a man, the homeless alcoholics in our community continue to be homeless alcoholics.

* * *

"It is conservatively estimated that current 'solutions' to the problem of the homeless alcoholic are wasting the community well over a million dollars a year – including $1 million in police work alone, over $300,000 in Workhouse expenses, municipal court costs – judges, clerks, bailiffs – and General Hospital costs.

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"Manifestly the penal approach fails."

Reid, *Some Medico-Legal Aspects of Alcoholism* 5-6 (November 1967). Mr. Reid, Counsel to the Ontario Addiction Research Foundation, made these remarks in an address to the Conference on the Role of the Medical Practitioner in the Treatment of Alcoholism and Drug Abuse.

"Legal sanctions have not been altogether futile in dealing with problems of alcohol. They can, and do, effectively limit what might be an unbridled consumption on the part of an entire society. But they can do little, or nothing, about the problem of alcoholism.

"Similarly, religious conviction can play an important part in inducing general moderation or even abstinence. But neither has it had much success with

alcohol's most virulent disease – alcoholism. Alcoholism is thus peculiarly a problem for the healing arts.

"This seems so obvious today that the failure to recognize it for centuries seems uncanny or perverse. It is safe to say that all laws, even those still on the books assume that the alcoholic can stop drinking, if he only tries. These laws are thus deterrent and punitive, seeking by penalties to force the alcoholic not to drink. The failure of these laws is a direct result of a failure to understand the nature of alcoholism. Putting a man in jail for 30 days won't cure his arthritis. No more will it cure his alcoholism."

Mahoney, *Discussion*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 34, 35 (June 1962). Judge Mahoney, a Special Justice of the Boston Municipal Court, recalled his first impression of the local "drunk court".

"the literally hundreds of human beings that one saw before the so-called bar of Justice. They were people who certainly were profoundly sick, injured, or pathetic souls, yet who nonetheless were parading methodically along a course which had been prescribed by Legislative statute and by Judicial process, bringing them to a kind of result that was, at best shocking, irresolute, unproductive and wasteful of human energy, human value and resource. So at an early point, it made a very indelible impression upon me regarding the efficacy of law, the importance of law, and the disparity between law and human understanding, knowledge and compassion in our society.

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"Nothing could be more depressing than to see the inexorable application of these laws each day as they exact their toll, this enormous waste of human energy and human resources."

MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 61, 63, 65 (June 1962). Mr. MacCormick was Commissioner of Correction in New York City from 1934 to 1940.

> "Of all the prisoners in this long procession, the alcoholics aroused my humane feelings most deeply and challenged my intelligence most urgently. I saw them come in repeatedly for sentences as short as two days and seldom for sentences longer than thirty days, and go out shaking as badly as when they came in: homeless, helpless and hopeless. I saw them come back again time after time, either in the statistics or as I watched the vans unload at our institutions. Sometimes a dead body would be lifted out of the van, and I knew that the man had been dying when he stood a few hours before in front of a magistrate and, as all too often happened, was given a tongue lashing by the judge.
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> "I am not sure whether I was more impressed by the inhumanity of our methods of dealing with the alcoholic or by the futility of the process. At that time I coined the term 'revolving door jails', which emphasized futility. The shortness of the sentences, which made treatment impossible even if there had been any desire to treat the alcoholics and knowledge of how to do it, and which made return to the same jail or another one almost inevitable, were the result of the practice, still prevalent today, of thinking in terms of the offense rather than the offender. This is expressed in the idea that 'you can't give a man a long sentence just for being drunk,' and that idea leads to the practical reality that you cannot hold an alcoholic long enough to treat him."

In 1956 Mr. MacCormick was Chairman of the Citizens Advisory Committee to the Attorney General of California on Crime Prevention. He quotes from that Committee's Report on "*California Jails*":

"The thousands of alcoholics who spend most of their lives 'wearing out the jails' of their home counties are more than a nuisance to the public, more than a heavy burden on the taxpayer, more than a menace to health. They are symbols of public indifference, of governmental ineptitude.

"Our method of dealing with them – the 'street cleaning operation' by which they are swept out of the doorways and alleys and gutters of our Skid Rows, to be dumped into 'drunk tanks' scarcely less filthy than the gutters, their brief contact with the court, their meaningless run-around through the revolving door jails, their stumbling return to Skid Row, the failure to provide humane, scientific, sustained care and treatment with effective follow-up clinics and social agencies after their release – all this constitutes a violation of basic principles of common sense and common humanity."

Gilbert, *Discussion*, in *Proceedings of the Massachusetts Conference on Alcohol, Alcoholism, and Crime* 79 (June 1962). Dr. Gilbert is Deputy Commissioner of the Massachusetts Department of Correction.

"If alcoholism is indeed an illness, then I suggest that we take a long hard look at our jails to see how they measure up as emergency medical facilities. Indeed, if alcoholism is an illness, then I question with Dr. MacCormick the propriety of sending problem drinkers to jail. The history of prisons as dumping grounds for perplexing and bothersome medical and psychiatric puzzles is not yet over it seems."

Goff, *Correction and the Alcoholic*, in *Proceedings of the Department of Health, Education, and Welfare Conference on The Court and the Chronic Inebriate* 21, 22-23 (April 1965). Mr. Goff is General Secretary of the Correctional Association of New York.

"While the topic assigned to me today was 'correction and rehabilitation', as long as we continue to

emphasize the word *police* when we talk of the *police* court offender; as long as we continue to talk about priorities in developing services for the alcoholic *defendant;*' and as long as we consider the Skid Row habitue and the chronic inebriate as in need of a 30 day *sentence*, a six month *sentence*, a year *sentence*, we will continue 'the exercise in futility' of trying to punish away an illness.

"Alcoholism is defined as an illness by the American Medical Association. Yet the use of jails, even the best ones, reflect a two hundred year old punitive attitude.

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"Documentations of the extent of the ineffectiveness of jail commitment of individuals addicted to alcohol is extensive."

Goff, *Alcoholism and the Administration of Justice* 6 (August 1964).

"However, the handling by penal institution commitment of the very symptom that would lead one to suspect alcoholism, namely repeated offenses of public intoxication has not only been ineffective but has created a wide cleavage between the knowledge of the medical and behavior sciences on one hand and the practices in the administration of justice on the other."

Alexander, *Jail Administration* 237 (1957). Dr. Alexander is Director of the Federal Bureau of Prisons.

"The unending series of fines which must be lain out in jail and short jail sentences repeated endlessly month in and month out, year in and year out, bear not the slightest semblance of an intelligent approach to the treatment and solution of the alcoholic's problem."

Pittman, *The Chronic Drunkenness Offender: An Overview*, in *Report of Proceedings of the Department of Health, Education, and Welfare Conference on the Court and the Chronic Inebriate* 6, 13, 14 (April 1965). Dr. Pittman is Professor of Sociology and Director of the Social Science Institute at Washington University (St. Louis).

> "The end stage in America's revolving door policy toward the chronic drunkenness offender is the workhouse or city jail. Previous research studies have shown that repeated incarceration does not act as a deterrent to the chronic inebriate's behavior.
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> "The primary problem is how does one effect change in existing patterns of care for the intoxication offender. Current institutions which handle the problem, such as jails, workhouses, and municipal courts *may* have a vested interest in the maintenance of the *status quo*. It is possible that the community may have more interest in maintaining its vegetable farm or its brood of pigs, the work force for which is the chronic offender, than in a systematic rehabilitation program."
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> "In some communities the emphasis is on the economic contributions of the offenders through their work on local roads and civic projects. There are American municipalities which actually budget the expected services of the offenders to their local civil projects."
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> "The major problem confronting us in dealing with the chronic drunkenness offender, however, is the lack of a focus of community and state responsibility for this problem group. Many conventional social and medical agencies state that the problem is not their responsibility. These offenders are on Skid Row; therefore they are the responsibility of the Salvation Army or the Volunteers of America. The police frequently say it is the responsibility of the courts, the courts counter with the duty of the penal institutions, and the latter counter-attack with

the responsibility of health and mental hygiene agencies. The net result is that no institution or person assumes responsibility for the social problems of these men. Thus, America continues to clutter its courts and jails with individuals whose 'crime' is a physical and social illness."

Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate* 1, 42, 139, 142 (1958).

"In fact, an analogy can be made between contemporary society's philosophy and methods in dealing with chronic inebriates and the conditions and beliefs that Dorothea Dix discerned in the 19th century with respect to the mentally ill.

* * *

"On the cultural front, the individual who is constantly arrested and imprisoned has a stigma attached to him by the rest of society and is outside the pale of respectability. * * * In the process, the resources of the individual suffer further deterioration and the development of the institutionalized offender occurs – one whose pattern of life becomes a constant movement from incarceration to release and incarceration, with increasing dependency on the institution.

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"Community attitudes, however, define the public inebriate as a nuisance who must be either fined or jailed. Some segments of the community seem to feel that punishment by incarceration or a stiff monetary penalty will induce the individual to change his style of living and way of life; that in the penitentiary he will grow penitent of his 'sins' and become a sober member of the community on his release.

"The results of our investigation negate completely the assumption that incarceration acts as a deterrent to the chronic public inebriate. Of the 1,357 men committed in 1954 on charges of public intox-

ication or allied offenses, only 5 were newcomers to prison life.

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"The present system is not only inefficient in terms of the excessive cost of jailing an offender 30, 40, or 50 times, but is a direct negation of the society's humanitarian philosophy toward people who are beset by social, mental and physical problems."

Rubington, *The Chronic Drunkenness Offender,* 315 The Annals of the American Academy of Political and Social Science 65, 66-67 (January 1958). Dr. Rubington is a Special Assistant for the Connecticut Commission on Alcoholism.

"The coexistence of drinking, and frequent arrests binds offenders to the Skid Row way of life.

"Punitive social reaction to drunkenness plays an important role in the establishment of this group membership. Arrest, the traditional reaction to intoxication, defines the offender as a person who is something less than human, thus not eligible to receive the benefits of customary social participation. Conversely, the offender is now socially defined as a member of the deviant community, thus eligible to receive the benefits of nonconformist social participation.

"Each time the offender is arrested he is exposed to the sentiments of moral indignation symbolized for society by police action. To this he responds with increasing sentiments of solidarity with the category of oppressed peoples, other offenders like himself. The increasing frequency of arrest marks the stages in alienation from society and in identification with the deviant subculture.

Logan, *Why Are We All Here?* in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Regional Conference of Municipal Judges* 3, 5 (October 1959). Mr. Logan is Executive Director, National Association of Municipal Judges.

> "Up until today, at least, your fellow citizens have delegated to you the responsibility for handling the ugly problem that society itself so shamefully shunned – the disposition of the destitute alcoholic, the drunk of Skid Row, the outcast and homeless men and women for whom our systems of society provide no niche nor refuge – and tools they have given you to perform this Herculean task? – the night stick and the jail.
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> "There are people here who have through trial and error attained some results, and they will offer their thoughts for your consideration. But who, if not you, are in a position to offer to our society the answers which are so sorely needed in this long-neglected field? Who, if not you, are in a position to point out the ways and means to put an end to the shameful waste of millions of public dollars each year in the senseless process of repeated arrest, trial and incarceration? Who, if not you, are qualified to tell the people of your community that suffering from an incurable illness is not a crime, that throwing one type of sick man into a common jail, while not prosecuting those with comparable illnesses, is not the American way of justice? Who, if not you, are entitled to tell the City Fathers that treatment facilities adequate to the magnitude of the problem must be furnished, that the night stick and the jail are insufficient to permit you to do the job you have been given?"

Reed M., *The Function of Alcoholics Anonymous,* in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Regional Conference of Municipal Judges* 55, 56-60-61 (October 1959). Mr. M is a lawyer who is a rehabilitated alcoholic.

> "In the meanwhile what is happening to the down-and-out, broken and defeated alcoholic? If he isn't protected by some segment of society, usually his family, he wanders the streets, sleeps anywhere he can, freezes to death in the byways. To the general public, this fellow is pretty much a nuisance, and so the public, not knowing what else to do with a drunk, has turned him over to the municipal and police courts of every city and hamlet of our country. And the judges in turn don't know what to do with him, and so they give him thirty days, sixty days, and ninety days. He keeps coming back, and so what he has, actually – and you people know this so much better than I – is a life sentence. They are the same people that you process over and over and over again. It is my belief that the police magistrate and the municipal judge who have the actual handling of these alcoholics, and who see the same alcoholics or drunks come before them time after time after time get the recognition and the understanding that this fellow is not a criminal, but that he must be a sick person.
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> * * *
>
> "Today alcoholism is generally being handled as a crime. Tomorrow it will be treated as an illness. It will be handled by Public Health as a public health problem, and not by the courts. But in the meantime we have a transition period, and it will come slowly, because public education will require a lot of time and a lot of hard work.

Lohman, *Incarceration as a Deterrent*, in "Processing the Alcoholic Defendant," *Report of Proceedings of the Rocky Mountain Regional Conference of Municipal Judges* 32 (October 1959). Mr. Lohman was at one time Chairman of the Illinois Parole and Pardon Board, and Sheriff of Cook County where he administered the Cook County Jail, the Country's 10th largest penitentiary. He is now Dean of the School of Criminology at the University of California in Berkeley.

> "In short, in our society it makes very little difference after a man has been to a penitentiary or a jail, *what* he has done to place him there, but it makes all the difference in the world to the society-at-large *where* he has been. They do not ask him what he did to get him put in jail. He has been in jail. He is a jail-bird, a convict. Did he steal? Was he a rapist? Is he an alcoholic? These are not the questions which the public asks. He has been in jail. One can elicit other considerations and concerns, but 'jail-bird,' – the term – that is enough. In the custody of the police, in the custody of the jailer, in the custody of the warden, in the custody of the penitentiary – so committed by the courts– this is what makes all the difference.
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> "So there is this latent effect of an attitude which is automatically produced on the part of the society toward an individual who has been subjected to this experience of stigma and corresponding rejection – second-class status.
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> * * *
>
> "It follows that the jail is the last place that one ought to think of sending an alcoholic. * * * In the case of alcoholics, we must avoid the change of individuals from persons who are in the early stages of alcoholism, remove them from a degrading process initiated by the law itself that causes them to lower their esteem so that there is no prospect at all for integrating them into conventional society.

> "Let me put this another way: I regard jailing the alcoholic in America today, – (and I say this out of my experience of four years of administering one of the largest monstrosities, if you please, of America, the Cook County jail) – as far as the abandoned cases, the desperate cases – represents a completion of the degradation of those individuals to a point of complete absence of self-esteem, by failing to provide a true answer to their problems in their earlier days."

The Correctional Association of New York and the International Association of Chiefs of Police, *Alcohol and Alcoholism: A Police Handbook* 11, 30 (1965).

> "Alcohol in large doses is a narcotics and some people can become dependent or addicted. This is typified by the alcoholic whose drinking is undeterred by warnings, fines or jail sentences. Such people are in need of specialized medical treatment.
>
> "Never lay stress on a person's seeming inability to handle drink like other people. It humiliates and angers him to have this pointed out, and raises his wall of defensiveness or defiance, making any attempt to reach and help him more difficult. Remember that anger, lectures or scoldings for the most part *only tend to drive the alcoholic more towards drink.*"

Brunner-Orne, *The Role of The General Hospital in The Treatment and Rehabilitation of Alcoholics,* 19 Quarterly Journal of Studies on Alcohol 108, 114-115 (March 1958). Dr. Brunner-Orne is Chief Psychiatrist, New England Hospital, Boston.

> "It appears evident that some of the older methods used in the fight against alcoholism have been failures. Social ostracism and jail sentences have proved as ineffective as the attempt to outlaw alcohol by national prohibition. The more realistic contemporary approach to the problem appears to offer a much better outlook. Nevertheless, hundreds of alcoholics are still arrested every day and kept

in jail at considerable cost to the community, without any improvement of the situation."

Block, *Alcoholism: Its Facets and Phases* 60-61, 134-135 (1965). Dr. Block is former Chairman of the American Medical Association Committee on Alcoholism.

"One cannot legislate against a disease. Nonetheless, many attempts have been made through the years to handle the problem of alcoholism through legal methods. When treatment for mental patients was limited to punishment, the same theory – that such patients were possessed by an evial spirit that could be driven out by beatings or other abuses – was applied to alcoholics. It was thought that punishment would teach them not to drink, thus eliminating the objectionable behavior. Little thought was given to the reasons for their excessive drinking; the only objective was to make them stop. As is usual when such an approach is used, punishment failed to deter those who drank.

* * *

"No attempt was made to determine the reasons for such behavior; the offense was deemed deliberate, and punishment was meted out as a deterrant to future offenses. Even the slightest understanding of the compulsive character of alcoholism should expose this fallacy. The term *compulsion* in itself explains why certain persons have no control over their actions, and, thus, why punishment is useless. Only proper treatment will have any effect upon the alcoholic.

* * *

"The homeless alcoholic can be defined as a person who has no family or is not in contact with his family, and whose domicile is determined by where he happens to be. If he is employed, it is usually on a day-to-day basis. He has no intimate friends, but only acquaintances in the Skid Row area. Like other alcoholics, the homeless alcoholic drinks alcohol excessively. He may or may not be a compulsive drinker, but in most cases his main interest is

to obtain and continue to drink alcohol, with little regard for himself or his surroundings. His excessive drinking may be periodic or continuous. He has the same characteristics, in many instances, as other alcoholics, to which is added homelessness.

* * *

". . . this individual has arrived at the lowest point of the disease."

Report of the Committee on Prisons, Probation, and Parole in the District of Columbia 86, 90, 92, 95, 99, 113, 123 (April 1957).

"The 'Skid Row chronic alcoholic' is the individual who now burdens the police, clogs the courts, and over-crowds the prisons. He is almost always unable to establish collateral or pay a fine. Unlike the 'social alcoholic', he is asocial, i.e., he does not have a home, a wife or children living with him, a job, or any social belongingness within the community. He lives on a day-to-day basis, and his time is taken up in drinking whatever he can lay his hands on. He appears unable to work steady on any one job. His psychiatric diagnosis points to difficulty in treatment and possible need for a confinement in an institution. His present social and economic resources, past adjustment, and motivation to do something about his drinking habit are all poor and he is strongly dependent on the Workhouse as a place to live, and to do what little work he can.

* * *

"The Committee believes this indicates that our court-jail problem could be eased considerably if the policemen on patrol were encouraged to make a more determined effort to send a greater number of these weekend drinkers directly to their homes. It also indicates, particularly for the first offender, the desirability of devising a somewhat fairer procedure for his release without formal charge when his case is one of simple intoxication.

* * *

"Present procedures are failing to reduce the growth of the overall alcoholic problem in Washington. Not only are more arrests being made involving more people, but the procedure apparently has very little affect as a deterrent to the individual.

* * *

"It is obvious, therefore, that the chief results of 'drunk' arrests at the present time are (1) to keep intoxicated individuals off the streets and, (2) to make the Nation's Capital unattractive to transient Skid Row alcoholics.

* * *

"However, the continuing growth of the problem in Washington leads us to conclude that police procedures, i.e., arrest and collateral, must be harnessed to contribute in a more positive way to controlling and reducing the overall alcoholic problem in the District.

* * *

". . . we cannot, ipso facto, say that the statistics show that a considerable number of these individuals engage in serious crime. To the contrary, the great majority of our 'Skid Row alcoholics' exist by panhandling and, occasionally, doing a day's work.

* * *

"The 'drunk' problem is a human problem, and an appreciation of both the problem and the futility of the present treadmill – arrest, collateral-fine, or jail – can best be gained by a look at the human products of the system.

* * *

". . . scores of chronic alcoholics who, as an examination would show, need treatment and institutional care for an indeterminate period, are sentenced time after time to short terms in the Workhouse – a procedure which neither benefits them nor the community."

"Rehabilitation of Alcoholics," *supra* at 26 n. 56.

Private Estes of the District of Columbia Police Department, at 28.

> "Well, I would say I let four go to the one I lock up.
>
> * * *
>
> "I would say that if a man is walking along the street and he is well dressed and you think he is a good citizen and you tell him to catch a cab and go home, why he will do it. In contrast to him, the 'smoke hound,' there is no use to tell him to go home because he won't."

Inspector Walter H. Thomas, acting Major and Superintendent, District of Columbia Police, at 30.

> "Our hearts and minds particularly go out to those individuals. We know they are derelicts, many of them, practically hopelessly involved in this alcoholic confusion."

Captain Rhoda Milliken, Head of Women's Division, District of Columbia Metropolitan Police Force, at 37-38.

> "It has been our custom in the Women's Division for many years, . . . when a woman comes in there of her own accord asking for protective custody, we give her just that and do not place a charge on the books. We mark them for investigation. When a woman is brought in drunk by a taxicab, we also book them for investigation and release them when sober. Thus, the statistics for arrest do not represent the total problem in the District. This is true of all communities.
>
> "Now I was wondering if you would permit me to say so, since the Committee has accepted the philosophy that this is an illness, that it is a public health problem. That being so, just why is it necessary to continue to keep it in the field of criminal jurisdiction? * * *

"The police have the power to pick up people who are mentally sick and send them to the proper type of institution for care and treatment, and I am just wondering if you could not consider the possibility of establishing a facility which would not be reached through the criminal courts. It would not mean that the police would not take charge of a situation where disorder and disturbances occurred. They would do the same as they now do in mental cases, which they handle every day.".

Judge Fay Bentley, District of Columbia Juvenile Court, p. 41.

"Through my experience I have been educated as it were to the point that your committee has arrived at, that alcoholism is a disease and that it is not criminal behavior, and that progress in meeting the situation cannot be made, in my mind, unless we break down in its entirety the concept that the alcoholic is a criminal.

"People who are alcoholics often say they do not want to quit drinking. They say it, not believing it, but they are afraid to acknowledge they would really like to quit because of the fact that there is so little help that they are getting and they do not like to add another failure to the situation."

Doctor Winfred Overholser, Superintendent, of St. Elizabeth's Hospital, at 59.

"So it is extremely refreshing, when one considers the fact that ever since crimes were described in the law books, that alcoholism at least in public places, was considered by the law to be a crime. It goes back a long, long ways. It has also been considered by the churches to be a sin. In other words, the era of morals has got so involved in this problem that the doctors have been pushed out in the cold, although it is fundamentally, to my mind, a medical problem. So it is extremely refreshing to find a proposition in the bill that is proposed to the effect that alcoholism is a disease. I think it is almost revolutionary, and I am delighted."

Howard B. Gill; former General Superintendent, District of Columbia Penal Institution, at 126.

> "Such amendments would recognize for the poor and shabbily dressed citizen what the police often practice now, as testified to at these hearings, with regard to the more prosperous and well-dressed drunk."

Lyam C. Duryea, M.D., Director Research Council on Problems of Alcohol, New York City, at 133, 135, 140-141.

> "Recognizing the fact that chronic alcoholism is an illness, it is considered inadmissible to center their care in correctional institutions where adequate medical facilities do not exist and where the institution of such facilities would not be in consonance with the precepts on which such correctional institutions are established and are currently operated.
>
> ". . . we are looking for information as to the proper manner of handling the fellow who is a chronic alcoholic, regardless of what the reasons were back of him becoming an alcoholic might have been. He is one, and now how are we going to handle him, or is there anything which can be done?
>
> "Our jails were never conceived of as being medical institutions for the care of the chronically ill. However, because of existing laws, failure heretofore to recognize alcoholism as basically a medical problem and lack of facilities in which to treat alcoholics as such and as an underlying factor in criminality, our jails have become in effect chronic-disease hospitals."

Michael M. Miller, M.D., who was director of the first court clinic for alcoholics in Cleveland, Ohio, founded in 1940, and helped found the District Alcoholic Clinic, at 144.

> "Some misconceptions have arisen with regard to what can be done for the alcoholic patient. These are due largely to the fact that in the past alcoholics were treated by penal incarceration and lack of

medical, psychiatric, and social aids. No prisons have been established for providing such treatment on a large scale. The alcoholics were considered in the same category as criminals rather than as ill people, and the attitude of the courts has been largely punitive.

"It is a major tragedy which has been visited upon the American people – the failure of our public agencies to recognize that the cause of alcoholic addition is psycho-social maladjustment rather than premeditated efforts upon the part of those very unhappy, unfortuate people to aggress society. For every alcoholic who is subjected to our inhuman, punitive treatment by the courts as in the past, many innocents have been made to suffer to a far greater degree frequently than the afflicted person, namely the family, the wives, and children, and the employer, as well as the community. I have at numerous times observed children without food because judges have levied a fine upon a low-income individual. Why must society seek revenge upon these unhappy sick people?"

Murtagh, *The New York City Program for the Skid Row Alcoholic*, in *Proceedings of Institute on the Skid Row Alcoholic of the Committee on the Homeless Alcoholic, National Committee on Alcoholism* 4 (March 1956). Judge Murtagh is Chief Magistrate of the Magistrate's Court, New York City.

"Night after night, in one city after another, we find the police picking up drunks on the street and locking them up in the 'drunk tank.' In the morning they are released or sentenced to a short term in jail, only to be picked up again soon after their release. Virtually all of these chronic drunks are recidivists. Many of them have records of hundreds of arrests. This futile procedure can not be defended, but it goes on day after day throughout the nation. It is truly a national disgrace. The penal approach to the Skid Row derelict is expensive, profitless, and inhumane."

APPENDIX H

Law Review Comments on the *Driver* and *Easter* Decisions[1]

Casenote, 8 Ariz. L. Rev. 351, 356 (1967):

> "The Court of Appeals for the Fourth Circuit rendered a courageous decision in the *Driver* case. Reacting to recent medical findings concerning the nature of chronic alcoholism and widespread revulsion at the criminal treatment of alcoholics, the court took a step toward solving the dilemma of the 'revolving door' drunk. The result is just, for the addict and for society. Where conduct cannot be controlled, there is no reason for punishment. Neither deterrence nor rehabilitation are served, and imprisonment for the sole purpose of sequestration is inhuman."

Case Note, 15 Cath. U. L. Rev. 259, 263 (1966):

> "The nexus, then, between an illness and the ban against cruel and unusual punishment seems to have been supplied by the *Robinson* holding . . . . The Fourth Circuit in *Driver v. Hinnant* simply took the next logical step, one foreseen by Mr. Justice White. It applied the ban to criminal convictions for public manifestation of disease symptoms."

2 Colum. J. of Law & Soc. Prob. 109, 130-131 (1966):

> "The overwhelming opinion of correctional officials and police court judges is that the penal approach should not be continued. * * *
>
> "The objections of judges and correctional officials reflect their judgment that alcoholism is really not a police matter, but should be treated as a social service problem. Repeated incarceration does not help the alcoholic to avoid future public intoxication; in fact, such punishment lessens his chance

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[1] All footnotes have been eliminated from quotations.

of breaking the 'revolving door' cycle. The coexistence of drinking and frequent arrest binds offenders to the Skid Row way of life. The jailing of the already socially disintegrated skid-row alcoholic is going to prevent any chance of self-improvement and reinforce his previous pattern of life. And for some skid-row alcoholics, jail may become a final resting place either because of the lack of treatment or through suicide."

Note, 52 Corn. L. Q. 470, 476, 478 (1967):

"Some courts have expressed the fear that there will be many 'pretenders' to the status of alcoholism who are not, in fact, suffering from the disease. This objection alone would appear insufficient to prevent the genuine alcoholic from obtaining justice. No one would claim that insanity is easy to identify, yet our sense of justice requires that an insane person be excused from criminal liability under certain circumstances. There seems to be no more difficulty in identifying alcoholism than in identifying insanity, and the demands of justice are equally strong. * * *

* * *

"Chronic alcoholism, a major health problem in the United States, has until recently been treated by the law as a penal problem. The decision . . . indicates that a trend is developing toward a more constructive and humane solution – medical care in hospitals in lieu of incarceration for penal purposes in the penitentiary."

Note, 1966 Duke L. J. 545, 551-553 (1966):

"One circuit has already adopted the *Driver* rationale with respect to chronic alcoholism, and *Driver's* extension of the 'status' rule of *Robinson* to encompass 'involuntary *symptoms*' of the status will have widespread effect if it is similarly adopted by the other circuits. First of all, approval of the *Driver* rationale can mean the end to the inhumane treatment of the alcoholic who, as a victim of 'street cleaning operations' employed by the police in lo-

cales such as the skid-row areas of the larger cities, finds himself perpetually passing in and out of jail without any attempt to rehabilitate him. By its decision, the court places the responsibility for the chronic offender squarely in the hands of the public health agencies. This approach offers hope to all alcoholics, particularly those in the early stages of their illness who previously were subjected to a recurrent cycle of arrest and jail, thus lowering the prospect of integrating them into conventional society even if their condition was curable."

Note, 52 Ia. L. Rev. 492, 511 (1966):

"If change does come to the legal status of the alcoholic, it will be slow and will have to be led by the liberal courts rather than the legislatures, where the alcoholic seems to have no champion."

1966 U. of Ill. L. Forum 767, 772 (1966):

"A 'revolving door' policy, however, is not the answer to the problem of the alcoholic. Nor is penal incarceration of any kind a solution."

Recent Case, 55 Ky. L. J. 201, 205-206 (1966):

"The significance of this decision lies in the fact that a new approach is applied to the age-old problem of chronic alcoholism and its punishment under the criminal law. 'Traditionally, we have tried to meet the problem of alcoholism by penal law. But there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the laws against drunkenness.' Perhaps the *Driver* case best illustrates the truth of this statement. The number of times Driver was convicted indicates the futility of his prison terms. Neither deterred nor rehabilitated, he and others like him are daily released again into society."

Recent Case, 43 N.D. L. Rev. 551, 553 (1967):

"Notably, cruel and unusual punishment has been defined as that which shocks the conscience of rea-

sonable men and must be considered in the light of developing civilization. Thus, newly developed advances in psychology and psychiatry and the enlightened treatment available for mentally disturbed people necessitate a re-evaluation of punishment of the alcoholic; and it surely does shock the conscience of reasonable men that the only recourse of the courts is to stigmatize his behavior as criminal by jailing him."

Comment, 18 S.Car. L.Rev. 504, 508 (1966):

"As a result, Driver, age 59, has spent two-thirds of his life in jail. This seems appalling, yet statistics show that there are approximately five hundred thousand men and women similarly situated in the United States. Of the two million arrests made annually in the principal cities for all crimes, forty percent are made under public intoxication statutes, and an additional ten percent are for disorderly conduct which usually involves public intoxication.* * *

"An end to this maltreatment will come only when society decides to face up to the problem and accept the fact that the chronic drunkenness offender is not a criminal but is a sick person who not only needs but deserves a chance to redeem himself from his pathetic way of life."

Note, 12 S. Dak. L. Rev. 142, 148-149 (1967):

"Criminal punishment of alcoholics has been found to be an unsatisfactory method of dealing with the problem since it seldom deters or rehabilitates. * * *

* * *

"Although facilities and funds are not available to handle a problem the size of civil treatment of alcoholics, this is not a reason to condemn the court's determination that alcoholism is a sickness and not to be punished criminally. This is an example of the legal system accepting knowledge and change from the social system."

Comment, 11 St. Lou. Univ. L.J. 250, 260 (1967):

> "Criminal conviction and punishment of the chronic alcoholic – even merely branding such individuals criminals – seems neither just nor civilized. * * * Recent advances in medicine and psychiatry have wrought great changes in our system of criminal law. Insanity and drug addiction are now considered diseases whose remedies are medical and psychiatric, not penal. Perhaps the courts are finally recognizing that chronic alcoholism warrants the same treatment."

Note, 41 Tul. L. Rev. 140, 141, 148 (1966):

> "Implementation of the reforms *Driver* seeks to encourage is a laudable and necessary goal, since the present system of punishing chronic alcoholics is ineffective and in need of revision. * * * Clearly, the public policy considerations behind the *Driver* decision are sound.
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> * * *
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> "Community inaction in this area has been attributed to a variety of causes, ranging from Biblically-oriented sentiments that all excessive drinking is a 'sin' and therefore should be punished, to scepticism about the value of enforced civil commitments. Regardless of the cause, the fact remains that changes in the present system are unlikely without intervention by the judiciary."

Recent Development, 11 Vill. L. Rev. 861, 868 (1966):

> "It is submitted that the instant cases are correct, both in applying the rationale of *Robinson* to alcoholism and in extending it to include symptoms of the disease."

Case Comment, 23 Wash. & Lee L. Rev. 401, 411 (1966):

> "Despite these and other unanswered questions, *Hinnant* brings the criminal law a step closer to a true reflection of the values of our civilization."